

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

STUDENTS FOR FAIR ADMISSIONS,)
Plaintiff,)

vs.)

THE UNITED STATES NAVAL)
ACADEMY, et al.,)
Defendants.)

CIVIL CASE NO.
1:23-cv-02699-RDB

2:08 p.m.

THURSDAY, DECEMBER 14, 2023
Courtroom 5D
Baltimore, Maryland

TRANSCRIPT OF PROCEEDINGS
PRELIMINARY JUNCTION HEARING
BEFORE THE HONORABLE RICHARD D. BENNETT

For the Plaintiff:

Thomas R. McCarthy, Esquire
Cameron T. Norris, Esquire
Patrick Strawbridge, Esquire (via telephone)
Consovoy McCarthy, PLLC
1600 Wilson Boulevard, Suite 700
Arlington, VA 22209

For the Defendants:

Joshua E. Gardner, Esquire
Catherine M. Yang, Esquire
Chris E. Mendez, Esquire
Medha Gargeya, Esquire
Department of Justice Civil Division
1100 L Street NW
Washington, DC 20005

(Computer-aided Transcription of Stenotype Notes)

Reported by: Amanda L. Longmore, RPR, FCRR
Federal Official Court Reporter
101 W. Lombard Street, 4th Floor
Baltimore, Maryland 21201
410-962-4474

Preliminary Injunction Hearing 12/14/23

P R O C E E D I N G S

(Call to Order of the Court.)

THE COURT: This is calling the case of Students for Fair Admissions versus the United States Naval Academy, Civil Number RDB-23-2699.

The masking policies of this court previously required that masks be worn in all public areas of the courthouse. That is no longer the case since November the 3rd, but it is still within the discretion of the presiding judge. I have been fully vaccinated and boosted as recently as my third booster six weeks ago, but we still do take precautions here in the courtroom, particularly in light of the fact that my judicial assistant called in today and she's got COVID. So we still do take precautions here in the courtroom so I do inquire of the vaccination status of counsel and the parties before me as we proceed.

So with that, welcome to all of you here. First of all, on behalf of the plaintiff Students for Fair Admissions, at some point in time it will be referred to as SFFA as it is in the pleadings. If counsel will identify themselves for the record, please.

MR. NORRIS: Good afternoon, Your Honor. Cam Norris.

THE COURT: Yes. And Mr. Norris, have you been fully vaccinated?

MR. NORRIS: Yes, Your Honor.

Preliminary Injunction Hearing 12/14/23

1 THE COURT: It's nice to have you here.

2 MR. ANDERSON: Richard Gabriel Anderson.

3 THE COURT: Hold on one second, please.

4 Mr. Anderson, you are not listed. It's nice to have you here,
5 but I don't see you being listed as -- you're not listed as an
6 attorney of record here for Students for Fair Admissions, so
7 you need to enter your appearance.

8 MR. ANDERSON: More than happy to. It was noted over
9 e-mail to the Clerk as well, and --

10 THE COURT: well, bottom line is you're not listed as
11 counsel of record here, and as of an hour ago you're not listed
12 on the docket sheet. So welcome, but you'll need to enter your
13 appearance.

14 MR. ANDERSON: of course.

15 THE COURT: All right. And you are with the same law
16 firm as is Mr. Norris, is that correct, Consovoy McCarthy?

17 MR. ANDERSON: Correct.

18 THE COURT: well, it's nice to have you here. I'm
19 just noting that you're not listed as having entered your
20 appearance so you need to enter your appearance.

21 MR. ANDERSON: of course.

22 THE COURT: And thirdly?

23 MR. MCCARTHY: Thomas McCarthy, Your Honor.

24 THE COURT: Yes, Mr. McCarthy. Hold on one second,
25 please. Yes, and you are clearly listed as counsel of record.

Preliminary Injunction Hearing 12/14/23

1 It's nice to have you all here. And Patrick Strawbridge I
2 believe is calling from your Boston office and is on the
3 telephone line.

4 Mr. Strawbridge, it's nice to have you here. Welcome.

5 MR. STRAWBRIDGE: Thank you, Your Honor.

6 THE COURT: All right. With that, you all may be
7 seated for a minute over on the plaintiff's side.

8 And on behalf of the defendants, the named defendants
9 United States Naval Academy, Lloyd Austin in his official
10 capacity as Secretary of Defense, Carlos Del Toro in his
11 official capacity as Secretary of the Navy, Bruce Latta in his
12 official capacity as Dean of Admissions for the United States
13 Naval Academy, and Rear Admiral Fred Kacher in his official
14 capacity as Acting Superintendent of the Academy.

15 If counsel will identify themselves for the record,
16 please.

17 MR. GARDNER: Good afternoon, Your Honor. Josh
18 Gardner with the Department of Justice.

19 THE COURT: Yes, Mr. Gardner. Nice to have you here.
20 And you have been fully vaccinated?

21 MR. GARDNER: Yes, I have.

22 THE COURT: All right.

23 MS. YANG: Good afternoon, Your Honor. Catherine
24 Yang from the Department of Justice. I am also fully
25 vaccinated.

Preliminary Injunction Hearing 12/14/23

1 THE COURT: Nice to have you here as well.

2 MR. MENDEZ: Good afternoon, Your Honor. Chris
3 Mendez from the Department of Justice, and I have also been
4 fully vaccinated.

5 THE COURT: Nice to have you.

6 MS. GARGEYA: Good afternoon, Your Honor. Medha
7 Gargeya with the Department of Justice, also fully vaccinated.

8 THE COURT: Nice to have all of you here.

9 I would also note that an amicus brief has been filed on
10 behalf of the National Association of Black Military Women, the
11 American Civil Liberties Union, as well as the American Civil
12 Liberties Union of Maryland, as well as the NAACP Legal Defense
13 Fund. Not that counsel needed to be here, but I'm not sure if
14 any of those counsel are here present or not.

15 MR. GARDNER: Your Honor, they are.

16 THE COURT: Okay. And if they will please stand. I
17 would just welcome them. Nice to have you all here, all three
18 of you. Ms. Kumar, Ms. Jeon, and Mr. Rocah, if I'm pronouncing
19 your names correctly, it's nice to have you here. Welcome.

20 And so with that, those in the back, I note at least one,
21 I see one person wearing a mask. If you have not been fully
22 vaccinated -- we sort of have an honor system here -- just so
23 indicate and Ms. Herndon, the Deputy Clerk of Court, has extra
24 masks that can be worn. I don't see that there's any
25 indication of any need for that, so I think we are ready to

Preliminary Injunction Hearing 12/14/23

1 proceed here.

2 I would note that -- you all may be seated for a minute.
3 Let me set the procedural posture here.

4 (Public Access Line Interruption.)

5 THE COURT: That's exactly what I was addressing.
6 This is a matter of public interest so it's an open line for
7 the public to listen in. And the public doesn't have the right
8 to just chime in but it has the right to listen, so pursuant to
9 our local rules that public access line is available for the
10 public to listen.

11 This is a motions hearing that is scheduled with respect
12 to the pending motion for a preliminary injunction which was
13 filed consistent with the complaint that was filed by SFFA,
14 again, Students for Fair Admission, versus United States Naval
15 Academy. The plaintiff is a nonprofit organization whose
16 self-described mission is to "eliminate racial and ethnic
17 classifications in preferences in school admissions," according
18 to its listing on the Internet, and it was SFFA's lawsuits
19 against Harvard University and the University of North Carolina
20 that led the Supreme Court to declare race-based admissions
21 policies unlawful in those institutions in I think the June
22 opinion of Students for Fair Admissions versus President and
23 Fellows of Harvard College earlier this year.

24 However, in that opinion -- I guess for the first time of
25 many times we will be referring to the footnote in that

Preliminary Injunction Hearing 12/14/23

1 opinion. In that opinion, the Supreme Court specifically
2 excluded military academies from its decision in Footnote 4 of
3 the opinion, specifically noting that it was because of the
4 "potentially distinct interests that military academies may
5 present."

6 This litigation here as well as I believe in the Southern
7 District of New York with respect to the United States Military
8 Academy at West Point appears to respond to this footnote in
9 that SFFA now brings a one-count action here in this case
10 against the defendants United States Naval Academy, Lloyd
11 Austin, Carlos Del Toro, Bruce Latta, and Rear Admiral Fred
12 Kacher, all of whom I've already listed in their capacities,
13 various capacities and their official capacities as defendants.

14 And essentially the allegation in this case is that the
15 Naval Academy's race-conscious admissions practice violates the
16 Fifth Amendment's Equal Protection Principles and, as I've
17 said, a similar complaint and motion for preliminary injunction
18 has been filed in the Southern District of New York, which is
19 pending before Judge Philip M. Halpern as well in that
20 district.

21 On October the 6th of this year, the day after SFFA filed
22 its complaint, the plaintiff filed a motion for preliminary
23 injunction urging this Court to issue an injunction immediately
24 prohibiting the defendants from considering applicants' race
25 when making admissions decisions, and this hearing essentially

Preliminary Injunction Hearing 12/14/23

1 is focused upon the request for that injunctive relief.

2 we are not deciding -- again, so the public understands,
3 we are not deciding the ultimate merits of the case at this
4 point in time. This is in the context of a motion for
5 preliminary injunction which has been fully briefed. And
6 briefing, I think, concluded, according to my schedule, by
7 December the 8th, and I want to thank counsel for jumping very
8 quickly on trying to get moving with this matter. In fact,
9 there was even a Notice of Corrected Declaration filed on
10 December the 12th, just two days ago.

11 So we are promptly having a hearing, and I want to thank
12 everyone for their diligent work in that regard on both sides
13 in terms of responding. And including you, Mr. Anderson,
14 because it didn't give you the courtesy of putting you as a
15 listed counsel, but you worked as hard as anybody, I'm sure.

16 we're laughing here.

17 The pending motion was filed on October the 6th and, as
18 I've said, it's been fully briefed. Let me just lay out just a
19 little bit more of a groundwork here and let me make a
20 suggestion as to how we will proceed. As I've said, in June,
21 on June 29th, actually, of this year, the Supreme Court issued
22 its opinion in SFFA's lawsuit against Harvard and the
23 University of North Carolina and essentially held that the
24 Affirmative Action programs at Harvard and the University of
25 North Carolina violated the Equal Protection Clause of the

Preliminary Injunction Hearing 12/14/23

1 Fourteenth Amendment. And while the Court declined to overturn
2 its 2003 decision in Grutter versus Bollinger, which held the
3 consideration of an applicant's race is one factor in an
4 admissions policy did not violate the Constitution, the Court
5 in what I'll refer to as the Harvard case in June, determined
6 that that school's program fell short of satisfying the burden
7 that their programs be sufficiently measurable to permit
8 judicial review under the rubric of strict scrutiny. And the
9 majority opinion of Chief Justice Roberts declared that
10 classifying and assigning students based on their race requires
11 more than an amorphous end to justify it.

12 And as I've noted of import here, again for public
13 consumption so the public understands, there was a footnote in
14 that opinion, Footnote 4, expressly noting that the Court
15 declined to opine on the use of race in admissions within the
16 United States military academies, specifically noting that the
17 opinion did not address the issue in light of potentially
18 distinct interests that military academies may present.

19 And so that's the gravamen of what we start to deal with
20 right away in terms of seeking injunctive relief. I would just
21 note parenthetically, again for purpose of the record and
22 public consumption, that to become a Navy or Marine Corps
23 officer, an individual must, one, either graduate from the
24 United States Naval Academy here in Annapolis; attend a
25 civilian college or university and participate in the Reserve

Preliminary Injunction Hearing 12/14/23

1 officers' Training Corps, better known as ROTC; attend Officer
2 Candidate School, better known as OCS, after graduating from
3 college; or, four, receive a direct commission after earning a
4 professional degree; and finally, or five, advance through the
5 enlisted ranks and then complete officer training. That is the
6 way one becomes a Naval officer or a Marine Corps officer here
7 in the United States Military.

8 specifically, then, finally in terms of the setting the
9 posture of this case, the admissions process at the United
10 States Naval Academy is governed by federal statute, 10 United
11 States Code § 8453, as well as by Department of Defense
12 directives, as well as Department of Navy regulations, as well
13 as internal guidance with respect to Navy regulations. So that
14 is the posture in which we find ourselves here today.

15 Now, I would -- essentially, in terms of the way the
16 argument has been presented in the papers, I think we'll start
17 with the fact that I once saw that Justice Sotomayor quoted
18 herself as saying she had a "hot bench" when she was a trial
19 judge, and I thought, I guess that's what I have. I guess I
20 have a hot bench. And she acknowledged that she asked
21 questions. I tend to ask questions. I have a hearing for a
22 reason. I enjoy the advocacy of lawyers and I will definitely
23 ask questions because I would always find that -- when I was
24 trying cases frustrated that the judge asked no questions. I
25 decided either he or she hadn't read anything or they had

Preliminary Injunction Hearing 12/14/23

1 already formed an opinion and so that would trouble me. So
2 you'll find that I will engage all of you in terms of questions
3 that I have as we move through this.

4 And in that regard, I note that the SFFA has essentially,
5 one, responded to the suggestion of the defendants, the
6 Government -- I'll refer to it as the Government -- with
7 respect to standing. And then we go through the analysis with
8 respect to the preliminary injunction and the requirements
9 because preliminary injunctions are extraordinary remedies.

10 And there are four criteria that have to be satisfied, as
11 we'll be discussing later, the four: that the moving party is
12 likely to succeed on the merits; the moving party is likely to
13 suffer irreparable harm absent preliminary relief; the balance
14 of equities favors the moving party; and finally, an injunction
15 is in the public interest. And we will get to that shortly,
16 but I think the issue has been raised as to standing.

17 I think that the gravamen of what we're going to be
18 dealing with here seems to me, Mr. McCarthy or Mr. Gardner or
19 whoever wants to opine, but you all -- generally I've found
20 whoever's close enough in is going to do the most talking and
21 whoever is farthest out has done the most research. That's the
22 inverse proportion. I see Mr. Gardner laughing so that means
23 he's affirmed that. So Ms. Gargeya, you may be very busy here
24 and, Mr. Norris, you as well.

25 But my point is -- we're laughing. The point is, what I

Preliminary Injunction Hearing 12/14/23

1 think we ought to do is address the issue of standing. I'll
2 hear argument on it. And then I'm inclined to deal with
3 irreparable harm, balance of the equities, and the public
4 interest, all of which ultimately, I think, are going to depend
5 in no small measure on likelihood of success on the merits, and
6 the briefing itself obviously reflects that emphasis.

7 I would note that the defense briefing, I think of the
8 60-some pages, I think 35 are directed to likelihood of success
9 on the merits. So it seems to me that the best way to handle
10 this is to deal with some of those preliminary matters and then
11 make sure we then zero in on likelihood of success on the
12 merits.

13 Does that sound agreeable to you, Mr. McCarthy or
14 Mr. Norris? Is that agreeable to you?

15 MR. NORRIS: Yes, Your Honor.

16 THE COURT: Mr. Gardner, is that agreeable to you?

17 MR. GARDNER: Yes, Your Honor.

18 THE COURT: So we'll deal with standing first. I'll
19 hear argument from both sides on that, and we will then proceed
20 in that fashion here.

21 So with that, Mr. Gardner, I'll be glad to hear from you.
22 I think you have challenged the standing of the plaintiffs, and
23 I'll be glad to hear from you, and then I'll give Mr. Norris an
24 opportunity to respond. You all can stay at the tables, you
25 can use the podium, whatever is convenient for you. I don't

Preliminary Injunction Hearing 12/14/23

1 care. That's fine. Use the podium, you're welcome. My
2 courtroom is still somewhat partially retrofitted with
3 Plexiglass, but I'll be able to hear you back there,
4 Mr. Gardner, I think.

5 MR. GARDNER: Thank you, Your Honor. And first of
6 all, let me affirm your intuition. The people that are sitting
7 at the table to my right have worked extremely hard on the
8 briefing in this case. I just wanted to publicly acknowledge
9 that.

10 THE COURT: Sure.

11 MR. GARDNER: With respect to standing, Members A and
12 B, the primary issue here is it's failed to meet its burden
13 through the submission of the two bare-bone declarations that
14 lack any detail as to actual concrete harm they've suffered as
15 a result of the Naval Academy's admissions policies.

16 The fact that they are proceeding anonymously simply
17 compounds the problem because it prevents the Government, and
18 ultimately Your Honor, from ascertaining the necessary facts
19 for standing, such as by determining whether they have met the
20 bare minimum requirements for consideration such as submission
21 of a nomination, passing the medical and physical evaluations.

22 First, plaintiff claims that in each case where SFFA was a
23 plaintiff they were allowed to proceed anonymously, but in each
24 of the cases that they've identified where they were a
25 plaintiff, they provided the identity of the members to the

Preliminary Injunction Hearing 12/14/23

1 defendants and the defendants were able to then vet whether or
2 not standing had been established.

3 THE COURT: was that at the stage of a preliminary
4 injunction or was it at the stage of the ultimate bench trials?

5 MR. GARDNER: Your Honor, I am not entirely clear
6 about that. I think SFFA could attest to that. I know it was
7 before trial because certainly there were depositions taken, at
8 least in the SFFA case, according to --

9 THE COURT: But you're not necessarily proffering
10 that it was at the stage of one seeking a preliminary
11 injunction.

12 MR. GARDNER: I can't represent that one way or the
13 other. Although, I will say this, now that I think about it.
14 In SFFA they did not seek a preliminary injunction, so it by
15 definition could not have been in that context or that posture.

16 THE COURT: Neither in the United States District
17 Court for the Middle District of North Carolina or the District
18 of Massachusetts they did not seek a preliminary injunction.

19 MR. GARDNER: That is my understanding, Your Honor.
20 If I am incorrect about that, I'm sure my colleagues will
21 correct me, but that's my understanding.

22 THE COURT: They probably didn't have the same
23 posture in terms of Supreme Court jurisprudence that they have
24 now, obviously.

25 MR. GARDNER: I would argue, Your Honor, that that

Preliminary Injunction Hearing 12/14/23

1 posture is really meaningless in terms of standing.

2 Plaintiff's essential argument here is they could not have sued
3 the Naval Academy or any of the service academies until the
4 Harvard decision because under Grutter, the Naval Academy's
5 admissions policies were lawful.

6 The problem with that argument is that the same could have
7 been said for Harvard and UNC's policies, which were equally
8 lawful under Grutter. The whole point of the SFFA lawsuit was
9 to change the law for civilian universities, which they were
10 successful in doing. So the notion that they could not have
11 sued until SFFA is just simply incorrect. They chose not to,
12 and presumably they chose not to because they wanted to get a
13 Supreme Court decision that struck down civilian universities.

14 THE COURT: But did not -- Mr. Gardner, did not the
15 Supreme Court note that SFFA had standing against Harvard and
16 UNC when it filed suit?

17 MR. GARDNER: Correct.

18 THE COURT: At the time it filed suit?

19 MR. GARDNER: Correct. And what happened there, Your
20 Honor, just to be clear, is that the Supreme Court, the sole
21 issue about standing was the germaneness of the organization's
22 missions to the lawsuit. We're not challenging the germaneness
23 here. What we are challenging is the inability to vet whether
24 Member A or B have actually been injured by the Naval Academy's
25 policies.

Preliminary Injunction Hearing 12/14/23

1 THE COURT: At this stage, my question to you is that
2 I thought that -- what I refer to as in the Harvard case, I
3 thought that at least initially there was reference to members
4 with pseudo names and the real names were never actually
5 disclosed to the public and they were ultimately disclosed to
6 the defendants later in discovery. Isn't that how it played
7 out?

8 MR. GARDNER: Correct. They were never publicly
9 disclosed but they were disclosed to the defendants, who then
10 had the opportunity to vet those claims.

11 THE COURT: Ultimately in discovery.

12 MR. GARDNER: Correct.

13 THE COURT: During the discovery period.

14 MR. GARDNER: Correct. But again, in SFFA they did
15 not seek a preliminary injunction so the issue of standing was
16 not before the Court. But there's one other, I think,
17 incredibly important distinction between SFFA and all other
18 cases where the challenge is to an "unconstitutional barrier."

19 In public universities, you need to apply, and when you
20 apply, then you are obviously subject to whatever those
21 barriers are. The thing that's different about the Naval
22 Academy and all the service academies are there are
23 prerequisites to even being considered for admission, among
24 other things, getting a nomination, traditionally a
25 congressional nomination but not necessarily. So there is a

Preliminary Injunction Hearing 12/14/23

1 big distinction --

2 THE COURT: You can have a superintendant nomination,
3 for example.

4 MR. GARDNER: You could have a superintendant
5 nomination. But plaintiffs have not alleged that they have
6 that. In fact, what plaintiffs have alleged is they have not
7 even applied. And that's significant as well, Your Honor,
8 because the deadline for submitting the initial application is
9 in two weeks and the typical deadline for submitting the
10 nomination is the end of January.

11 And so this is the big distinction. We are not arguing
12 that to be ready and able one has to show that they will be
13 admitted. That's not what we're arguing. What we are arguing
14 is they have to show that they are capable of being considered
15 for being admitted, and that is what they cannot do here
16 because of the distinction between the Naval Academy, which has
17 prerequisites like, again, a nomination, being medically
18 cleared, being -- the medical exam, the physical exam.

19 They have not established they've done any of those things
20 and therefore they can't even be within the pool of people that
21 are considered. That is why they cannot show an injury. And
22 all we have are two bare-bone declarations that are a single
23 page apiece where they have a single sentence, which, by the
24 way, if you look, they literally are just verbatim legal
25 conclusions that they are ready and able without any showing

Preliminary Injunction Hearing 12/14/23

1 that they've actually done the prerequisites that would allow
2 them to be within the pool of people who could actually be
3 considered for a nomination -- or, sorry, an offer of
4 admission.

5 So that is our fundamental argument with respect to
6 standing, that it is their burden. On a PI they've got that
7 same standing burden that they would have on summary judgment,
8 and with a single-page declaration with one sentence that is
9 conclusory, they cannot meet that burden.

10 THE COURT: Well, thank you, Mr. Gardner.

11 Mr. Norris, I'll be glad to hear from you on this.

12 MR. NORRIS: Thank you, Your Honor. I'd also like to
13 confirm your intuition that I have done very little of the
14 research but will do a lot of the talking.

15 THE COURT: Actually, the chair you were in would
16 imply that you've done a lot of research, Mr. Norris.

17 MR. NORRIS: Oh, yeah. I've done it all, that's
18 right.

19 So my friend's argument is not really about the fact that
20 our members are pseudonymous at this stage. He's saying he
21 doesn't have certain information that we need to prove
22 standing. That's an argument that you don't have certain
23 information that we need to prove standing, not an objection to
24 their pseudonymity. I don't think that argument's really in
25 the case. Even if it were, he has not explained why he needs

Preliminary Injunction Hearing 12/14/23

1 their real first and last name to assess whether they have
2 standing in this context.

3 The B.R. case from the Fourth Circuit says the use of
4 pseudonyms is irrelevant to Article III standing. The Speech
5 First case, which I litigated in the Fourth Circuit, found that
6 we did have standing in the preliminary injunction posture on
7 behalf of anonymous standing members because this is very early
8 in the case, before discovery, when that information would be
9 exchanged.

10 You asked about the SFFA case. Our members were
11 pseudonymous in the complaint early in the case. We did not
12 give that information to Harvard and UNC until years later in
13 discovery under seal under a protective order. That's where
14 this debate would happen.

15 THE COURT: There was discovery for years,
16 Mr. Norris?

17 MR. NORRIS: It was years. Well, the case was stayed
18 for awhile because of the Fisher litigation.

19 THE COURT: I want to put you all notice that I don't
20 really let discovery go for years.

21 (Laughter.)

22 MR. NORRIS: I'll say Amen to that.

23 THE COURT: So that frightens me because we're not
24 going to have years of discovery here. We're going to have
25 months of discovery, not years.

Preliminary Injunction Hearing 12/14/23

1 MR. NORRIS: Your Honor, we were not happy that the
2 Harvard litigation took five years in the District Court,
3 either. We hope this one goes faster, especially given the --

4 THE COURT: I'm prepared to make a promise to all the
5 parties here as well as members of the public, this case isn't
6 going to go for five years here.

7 MR. NORRIS: Excellent. So I think where this debate
8 will happen is, if they ask for that information in discovery,
9 we will likely give it to them under a protective order under
10 seal where the names are not revealed to the public and they
11 can ask any questions they'd like to.

12 This is prediscovery preliminary injunction motion. They
13 are not entitled to information now. It's not even relevant to
14 standing, as the Fourth Circuit held in B.R. and the DC Circuit
15 held in this exact context in the Highway Safety case that we
16 cite in our brief overruling the same argument by DOJ.

17 But in terms of, you know, the information they said they
18 don't have, they just misunderstand the nature of the injury in
19 these cases. The injury is the inability to compete on an
20 equal footing, not the inability to get in or to meet all of
21 the requirements that Navy would actually assess in terms of
22 deciding whether they should be admitted to the Academy. It's
23 the existence of the racial preference, the racial
24 discrimination that is the harm. The Court has said that in
25 the Jacksonville case, it said it again in the Harvard case, it

Preliminary Injunction Hearing 12/14/23

1 said in the Gratz case. That's always been the rule, really
2 the unique rule in this area of the law.

3 Now, I think the argument that they made in the brief is
4 that maybe our students would get in anyway through one of the
5 so-called race-neutral ways that the Naval Academy admits
6 people. But for one, there really aren't very many
7 race-neutral parts of their process. If our students were not
8 white, for example, they could get a Letter of Assurance from
9 Navy very early on in the process with a much lower score than
10 they would need because they are not a minority race. They
11 also get in through the additional --

12 THE COURT: You're basing that upon an affidavit from
13 one of the professors at the Academy in terms of the 600 as
14 opposed to 550 score. Is that what you are referring to?

15 MR. NORRIS: I'm not sure we have those specifics,
16 Your Honor. They say that when they send out those letters,
17 race is a reason that they will send out a letter to someone
18 who gets a lower score than they would otherwise send the
19 letter to. They also say they use race when doing additional
20 appointees, which is sort of the pool that's left over at the
21 end.

22 And the corrected declaration that they filed shows that
23 race plays a large role in those decisions. It's over 55
24 percent of people who get in that way who are racial
25 minorities. They also say that if we are -- 65 percent of

Preliminary Injunction Hearing 12/14/23

1 congressmen do the competitive method where they say, you know,
2 choose who you want among our nominees. When they do the
3 competitive method, they can use race, you can have a lower
4 score than someone, but if you're a racial minority, you get in
5 instead of them. So they use race throughout the process.

6 I'm not sure what race-neutral avenue they're talking
7 about. But under Gratz, we don't have to prove that race would
8 be the reason we did or didn't get in. It's the inability to
9 compete on an equal footing, and under Gratz our members don't
10 even have to submit an application in order to have standing.
11 They just need to be ready and able to apply.

12 we have satisfied that standard, just like in Gratz,
13 because we have members who proved that they're ready and able
14 to apply because they've applied before and been rejected. And
15 when they applied before, they were fully qualified, they got a
16 congressional nomination, which makes it likely enough for
17 Article III standing that if a court ordered Navy to stop
18 considering race, they would apply again. That's all they need
19 to show to have Article III standing.

20 THE COURT: Mr. Norris, I think the thrust of your
21 response on this standing issue is that your clients don't lose
22 standing, your organization does not lose standing just by
23 referring to its members with pseudo names. That's the thrust
24 of your response.

25 MR. NORRIS: Correct. I think that was the thrust of

Preliminary Injunction Hearing 12/14/23

1 the argument in our brief.

2 THE COURT: You've cited other cases. This all has
3 to do with the, I think -- just for the record, the ambit of
4 the Supreme Court's opinion in Summers versus Earth Island, the
5 2009 opinion I think it is, in which there was some issue as to
6 lack of -- failure to identify a specific member. And your
7 point is is that generally in these types of cases, its use of
8 pseudonyms at least early in the litigation is not prohibited,
9 is your point.

10 MR. NORRIS: Correct, Your Honor. We did identify
11 specific people, two specific people, and named them. We just
12 didn't give their legal names, which has nothing to do with
13 Summers.

14 THE COURT: Thank you very much.

15 MR. NORRIS: Thank you.

16 THE COURT: Mr. Gardner, do you want to be heard
17 further on this?

18 MR. GARDNER: Yes, Your Honor. Very briefly, if you
19 don't mind.

20 THE COURT: Yes. Our review here in chambers, I will
21 just note that there appears to be abundant authority that
22 there can be use of pseudonyms in high-profile cases such as
23 this, and it doesn't mean that they remain anonymous forever
24 and it doesn't mean that eventually you're not able to pursue
25 whether or not they satisfied the physical requirements and

Preliminary Injunction Hearing 12/14/23

1 what have you, obviously. But I think you've cited -- if I'm
2 not mistaken, you've cited two District Court opinions in
3 support of your position, but there is a fair amount of
4 authority on a Circuit Court level that uses pseudonyms as
5 appropriate. It doesn't bar standing here.

6 MR. GARDNER: I will acknowledge that there is a
7 split of authority on that issue, Your Honor. I absolutely
8 will acknowledge that. I'll also acknowledge that the SDNY
9 case that we cite to is currently on appeal in the Second
10 Circuit. The law is certainly uncertain on that issue. But
11 what isn't uncertain is that plaintiff needs to show that they
12 otherwise would have the opportunity to be considered for a
13 slot at the Naval Academy in the absence of this
14 unconstitutional barrier.

15 THE COURT: That's clearly something that can be
16 raised down the road in discovery in this matter, correct?

17 MR. GARDNER: What my position --

18 THE COURT: We're just dealing with standing in the
19 context of this hearing and a motion for preliminary
20 injunction.

21 MR. GARDNER: Correct.

22 THE COURT: In terms of the proffer of the anonymous
23 persons, the two plaintiffs, A and B I think is how they're --
24 I think they are called A and B, are they not, Mr. Norris?

25 MR. NORRIS: That's right.

Preliminary Injunction Hearing 12/14/23

1 THE COURT: A and B.

2 MR. GARDNER: They are.

3 THE COURT: And it doesn't mean in perpetuity and it
4 doesn't mean that you can't -- ultimately during discovery if
5 it turns out that one of them may have a severe disability of
6 some sort and couldn't pass a physical examination for the
7 Academy, then that's a separate matter. But for purposes of
8 this hearing in terms of questioning the standing, I think that
9 the case law seems to be pretty strong that the use of
10 pseudonyms is very common in these kinds of cases.

11 MR. GARDNER: And the specific argument I'm advancing
12 now, Your Honor, has nothing to do with whether or not the
13 plaintiffs are anonymous. It has to do with the fact that by
14 alleging only that they are ready and able to apply without
15 separately showing that they are even within the pool of
16 applicants who could be considered because they've not met the
17 special requirements for the Naval Academy, which are things
18 like a nomination.

19 I know plaintiff's counsel just explained, well, they got
20 a nomination last time so it stands to reason they may get one
21 in the future. That's speculative, Your Honor. And the fact
22 is that given that they need a nomination by the end of
23 January, generally speaking, to even be considered, putting
24 aside this alleged barrier, that in and of itself is an
25 insufficient injury. They cannot show that any injury could be

Preliminary Injunction Hearing 12/14/23

1 remedied by this Court because there's a separate --

2 THE COURT: we should explore that because it seems
3 to me that we're clearly not going to have this case get
4 resolved by the end of January, but maybe we're going to get it
5 resolved by the end of the following January, correct?

6 MR. GARDNER: That would be my hope, Your Honor.

7 THE COURT: So correct me if I'm wrong, but the bar
8 is that one cannot be over the age of 23 and apply for
9 admission.

10 MR. GARDNER: That's correct.

11 THE COURT: And they have proffered that they are
12 clearly below the ages of 23, so the issue of standing isn't
13 determined just as to January of 2024. It would certainly
14 appear that that's not correct, that they can reapply next year
15 or seek to apply depending on how the litigation goes, and it
16 may be January of 2025 that's determinative of that.

17 MR. GARDNER: And Your Honor, that goes to our
18 argument -- I don't want to step on my arguments about
19 irreparable harm, but that's one of our primary points, is
20 there's nothing that stops them from actually reapplying in the
21 future, and if they could meet these statutory requirements
22 that get them in the pool of people that can even be
23 considered, then certainly that would go a long way to
24 establishing standing.

25 The point is that there's nothing this Court can do to

Preliminary Injunction Hearing 12/14/23

1 address their injury because even if the Court said the Naval
2 Academy can't consider race, if they can't show that they would
3 even be subject to consideration because they don't have things
4 like, again, a nomination, that they've passed the medical and
5 physical exams, then this becomes a real advisory opinion.
6 That's the primary point and that has nothing to do with
7 whether they're anonymous.

8 THE COURT: I'm not going to rule from the bench on
9 any of these yet, but I'll just tell you I think your -- pardon
10 the pun -- you're in shallow water here with respect to this
11 because on that theory, on that theory, with respect to having
12 had a congressional nomination and the process -- as a matter
13 of fact, Congressman Ruppertsberger is a friend of mine and he's
14 interviewing people this Saturday, December the 16th, with
15 respect to nominations down the road for the class of 2025, not
16 for January, for a year from now.

17 MR. GARDNER: Yeah.

18 THE COURT: So on that theory, in terms of if one
19 doesn't have a nomination in his or her pocket they don't move
20 forward, I don't know how anyone could ever move forward,
21 Mr. Gardner. How would they ever move forward?

22 MR. GARDNER: I think it -- I can give you a very
23 concrete example.

24 At the end of January, a plaintiff who has a nomination in
25 hand and could show that they're otherwise able to compete in

Preliminary Injunction Hearing 12/14/23

1 the pool because they have the -- you know, the physical
2 evaluation done and the medical evaluation done could then say,
3 look, I am now subject to these barriers and now I would have
4 standing and that's --

5 THE COURT: I don't want to get too deep into this
6 but I think really in terms of standing, I think to accept that
7 argument really would place the bar on standing in this kind of
8 case almost -- it would be almost unachievable. It's
9 unachievable in terms of trying to be interviewed by a member
10 of Congress and get a congressional nomination if you're not
11 going to get a superintendant's nomination, for example, from
12 the Naval Academy. And the papers have clearly shown, you've
13 acknowledged in your papers that that many times goes to
14 outstanding athletes.

15 MR. GARDNER: Correct.

16 THE COURT: we'll get there in a little bit. Just
17 for members of the public, I think in the two years that you
18 referred to, the class of 2026 at the Naval Academy currently
19 and the class of 2027, which would be the junior and
20 sophomore -- it used to be called the yearling classes -- as
21 well as the junior year, 11 out of 14 superintendents'
22 nominations were for outstanding athletes and another year 8
23 out of 11 were outstanding athletes.

24 I mean, my point is is that the notion that standing is to
25 be dependent upon all the other steps before you get there,

Preliminary Injunction Hearing 12/14/23

1 I'll just tell you early in the game on this, Mr. Gardner, I am
2 definitely not inclined to go down that path because I think
3 that just sets the bar way, way too high. And we'll deal with
4 this probably on another day and you can probably try to brief
5 this on a Motion to Dismiss or something, but I just don't
6 think that's an accurate summary of standing law. It can't be
7 in the context of this. If you note that someone has to have a
8 congressional nomination in his or her pocket or they don't
9 indicate and move forward on a case like this, I just don't
10 think it bears fruit, quite frankly.

11 MR. GARDNER: I understand your position, Your Honor.

12 THE COURT: Thank you very much, Mr. Gardner.

13 So with that, we'll let that sit, but I will tell you it's
14 pretty clear to me that the standing issue here, as far as I'm
15 concerned, in light of the complaint that's been filed and the
16 reference to Member A and Member B, that standing is satisfied,
17 but I'll follow up with an opinion on this pretty quickly.

18 I always make my law clerks nervous when I say "I" and
19 they look over at me meaning "they" will draft an opinion
20 pretty quickly. But we'll get on it. I promise you we'll get
21 an opinion out within a week of today's hearing on some of
22 these matters, but I don't have any difficulty with the matter
23 of the SFFA's organizational standing here.

24 So let's, if we can -- now, I would note that we really
25 didn't get into the matter of judicial deference to judgment of

Preliminary Injunction Hearing 12/14/23

1 military authorities, but I don't think I really need to get
2 into that at this stage. So with respect to the standing
3 issue, I've indicated I'll rule as I've indicated that there is
4 standing here.

5 Essentially, the standard for a preliminary injunction, so
6 the record is clear, is that the purpose of a preliminary
7 injunction is merely to preserve the relative positions of the
8 parties until a trial on the merits can be held. This is a
9 declaratory judgment action. It's a nonjury trial that would
10 be scheduled, as it was a nonjury bench trial in the District
11 of Massachusetts as well as -- was it the Middle District of
12 North Carolina in UNC? I think it was the Middle District of
13 North Carolina at the University of North Carolina.

14 And it is an extraordinary remedy. And it has to be
15 emphasized for the members of the public and those of interest
16 here, we're not deciding this case today. We're dealing with
17 the question of a preliminary injunction being granted. But
18 this is an extraordinary remedy that involves the exercise of
19 very far-reaching power to be granted only sparingly and in
20 limited circumstances, as the Fourth Circuit has consistently
21 held here.

22 And the criteria that have to be satisfied to issue -- for
23 this Court to issue a preliminary injunction must essentially
24 follow the test set forth by the United States Supreme Court in
25 Winter versus Natural Resources Defense Council in 2008, and

Preliminary Injunction Hearing 12/14/23

1 that is that there are four criteria that have to be satisfied:
2 one, as I've already mentioned, the moving party is likely to
3 succeed on the merits; two, that the party is likely to suffer
4 irreparable harm; three, that the balance of equities favors
5 the moving party; and, four, that an injunction is in the
6 public interest.

7 And this Court cannot issue a preliminary injunction
8 absent a clear showing that all four requirements are
9 satisfied, as the Fourth Circuit summarized in a case of two
10 years ago, *Leaders of a Beautiful Struggle* versus Baltimore
11 Police Department. That was, in fact, reversed on other
12 grounds based upon a ruling that I made, but it was not
13 reversed on that basic standard.

14 So we've addressed an initial issue as to standing here,
15 but the next of the three I want to address immediately before
16 we get to the matter of the likelihood to succeed on the merits
17 is the matter of irreparable harm.

18 And with that, I think I'll be glad to hear from you
19 first, Mr. Norris, because essentially in terms of the elements
20 that you must satisfy for there to be a preliminary injunction
21 in this matter, we'll first address irreparable harm. And I'll
22 give Mr. Gardner an opportunity, or whoever else is going to
23 argue to respond, and then we'll proceed accordingly as to the
24 balance of the equities as well as public interest after we
25 have argument presented on each one.

Preliminary Injunction Hearing 12/14/23

1 So with that, I'll be glad to hear from you on irreparable
2 harm, Mr. Norris.

3 MR. NORRIS: Yes, Your Honor. And we fully
4 appreciate that preliminary injunctions are extraordinary
5 remedies, and we think this is an extraordinary case.

6 After Harvard, the Naval Academy is not just likely to
7 lose this case at the end, it is extremely likely to lose,
8 which means what's at stake is whether the Naval Academy is
9 going to be able to racially discriminate against one, maybe
10 two, maybe three cycles of young Americans based on their skin
11 color until the end of this case, or will it have to comply
12 with the constitutional command of racial neutrality while this
13 case is pending, which merely requires it to pause what it says
14 is its limited consideration of race. And we're prepared to
15 talk mostly, Your Honor, today about the merits because --

16 THE COURT: Well, I guess just so we're clear, the
17 Supreme Court -- and I think it's careful for purposes of
18 public consumption, it can't be emphasized too much,
19 Mr. Norris.

20 Again, I'm making sure, members of the public who are
21 listening in on this, the Supreme Court was very specific.
22 There wasn't any ambiguity on the Supreme Court on this. The
23 Supreme Court specifically held that the military academies
24 were excluded from its decision and the exact language of Chief
25 Justice Roberts' opinion was because the "potentially distinct

Preliminary Injunction Hearing 12/14/23

1 interests that military academies may present."

2 So the issue really comes down to whether or not there are
3 distinct interests that may be presented. It isn't a question
4 of whether any of those will satisfy. That's not what the
5 Supreme Court said. The Supreme Court said whether potentially
6 distinct interests may be presented, and I think that's a more
7 accurate summary of the status here in terms of the Harvard
8 decision.

9 MR. NORRIS: I don't want to push back too much, Your
10 Honor, because we think they clearly don't satisfy that.

11 THE COURT: Sure.

12 MR. NORRIS: But the Court also said --

13 THE COURT: Well, I'm not arguing with you. I'm
14 quoting the Chief Justice. To the extent that you're not
15 summarizing it in my eyes correctly, it's important for the
16 public to understand this judge does not agree with your
17 summary that you just made.

18 The Supreme Court was very specific as to what it said,
19 and that is what was said. It doesn't mean that you don't
20 prevail someday. You may or may not. But the question is the
21 matter of whether or not there are distinct interests that may
22 be presented is what is before the Court, and that's ultimately
23 how it will have to be determined here.

24 MR. NORRIS: And I believe that's how we teed it up
25 in our reply brief as well, Your Honor. I just want to add

Preliminary Injunction Hearing 12/14/23

1 because I think it's important.

2 THE COURT: Sure.

3 MR. NORRIS: The Court also said no Academy is a
4 party to this case, which I think what the Court was getting at
5 is we don't actually know how they use race or not in
6 admissions. Nobody knew really until they filed their
7 opposition with 650 pages of exhibits in this case. It was a
8 black box. We knew that they did it in some capacity, but we
9 didn't know how they did it and we didn't know whether they
10 would continue after reading Harvard, which makes it very
11 difficult for anyone to use race in admissions.

12 But the merits really are key even though there are four
13 factors for a preliminary injunction because this is a
14 constitutional case, much like Leaders of a Beautiful Struggle,
15 where once you conclude that they are likely violating the
16 Fifth Amendment, the other factors really fall. So of course
17 violating someone's constitutional rights is the irreparable
18 injury. Constitutional rights are difficult to quantify and
19 cannot easily be repaired with damages.

20 Nothing, nothing about our injuries can be remedied with
21 damages in this case because the Government has sovereign
22 immunity. You can't get damages against it. That's the key
23 test for irreparable harm.

24 Our students will also lose the opportunity to compete for
25 a spot in the Naval Academy this year if you do not grant a

Preliminary Injunction Hearing 12/14/23

1 preliminary injunction, which the Courts have said is also an
2 irreparable form of injury that's hard to quantify. I could go
3 on, but if there's any injury, any constitutional injury that's
4 irreparable, it's got to be racial discrimination which comes,
5 the Supreme Court said, with -- it demeans people. It doesn't
6 treat them as equals. It carries extra baggage besides just
7 having your constitutional rights violated, which that by
8 itself is enough.

9 Now, that's the irreparable harm. The other factors also
10 just really follow from there. The public interest is with
11 enforcing the Constitution correctly. Several Courts have said
12 that, including in the Leaders case. And the balance of the
13 harms in the public interest really merge when the Government's
14 on the other side. And the public interest, the balance of
15 harms, the Government is not harmed by not being able to
16 enforce a policy that is likely unconstitutional anyway.
17 That's impossible for them to suffer harm.

18 And I just want to talk about the harm they've identified.
19 Now, they've said that, look, we are in the middle of the
20 admissions process. I think that's quite overstated. The
21 admissions process, the general admissions process does not
22 start until February 1st. You don't even have to turn in your
23 application until January 31st. Most admissions decisions are
24 made from February to April. That's in their declarations.

25 Now, they have an early admissions process, sort of.

Preliminary Injunction Hearing 12/14/23

1 They're not really allowed to do these early admissions so they
2 have these Letters of Assurance that they send out. The Latta
3 declaration at, let's see, at Paragraph 64 says as of the date
4 of that declaration 15 people have accepted offers of admission
5 to the Naval Academy this year. 15 people. That's not very
6 disruptive. That's not very much. That's movement that's
7 happened so far in the admissions process.

8 And injunctions are prospective by their very nature.
9 We've said in our brief and we say again today the Naval
10 Academy -- and the Court can make this clear, the Naval Academy
11 does not need to rescind any offer that's been made prior to a
12 preliminary injunction. We're talking about the big chunk of
13 people in the general admissions process that's coming up.
14 That's where our members would compete. That's where the vast
15 majority of decisions were made. The preliminary injunction
16 would stop them from considering race as a factor, which they
17 say is just a limited part of their admissions process for that
18 group of people.

19 Now, that's some disruption, but that disruption is vastly
20 outweighed by illegal racial discrimination, the violation of
21 constitutional rights. And Footnote 9 of the Harvard opinion
22 says that universities really have assumed that risk in some
23 respects because they have continued to use race even though
24 Grutter says that you have to have an expiration date on your
25 use of race and even though strict scrutiny by its very nature

Preliminary Injunction Hearing 12/14/23

1 means you have to constantly be re-evaluating whether you're
2 allowed to use race. So this is an unstable practice as it is.
3 They don't have much ability to rely on its continuing
4 validity.

5 THE COURT: Again, your viewpoint, I think as you've
6 said, is that this very much depends upon the analysis in terms
7 of likelihood to succeed on the merits --

8 MR. NORRIS: Absolutely.

9 THE COURT: -- for the constitutional violation.
10 You're correct that loss of any constitutional freedom,
11 regardless of the time period, will then constitute an
12 irreparable injury if there is a constitutional violation
13 that's occurred.

14 MR. NORRIS: Correct.

15 THE COURT: Well, thank you very much, Mr. Norris.

16 MR. NORRIS: Thank you.

17 THE COURT: On that, Mr. Gardner, I'll be glad to
18 hear from you.

19 MR. GARDNER: Thank you, Your Honor. I didn't hear
20 my colleague speak at all about the justification for the delay
21 in seeking preliminary injunctive relief, and that's
22 significant here because plaintiff's suggestion that delay has
23 no relevance where constitutional rights are asserted has been
24 squarely rejected by both the Supreme Court and Your Honor.

25 In the Supreme Court's case *Benisik* versus *Lamone* from

Preliminary Injunction Hearing 12/14/23

1 2018, the Supreme Court found that in a constitutional
2 gerrymandering case the plaintiff's unnecessary yearlong delay
3 in asking for preliminary injunctive relief weighed against
4 their request. And in your very recent decision, *Roswell v.*
5 *Baltimore*, Your Honor concluded that a more than yearlong delay
6 in seeking a preliminary injunction in a First Amendment speech
7 challenge undermined the claim of irreparable harm.
8 Accordingly, the issue --

9 THE COURT: On that case, it was a gentleman with
10 signs on the street corner. He'd been doing it for years and
11 waited a couple years before he filed the lawsuit.

12 MR. GARDNER: Correct. And here you've had a policy
13 that has been in place for decades that plaintiffs could have
14 challenged at any time since the existence of organization.

15 THE COURT: Just in fairness to them, Mr. Gardner,
16 clearly the Harvard -- what I'll call the Harvard case was a
17 transformative case that then opened up other avenues to the
18 plaintiff. I think that's pretty clear. I'm not so sure
19 that -- given the fact that Chief Justice Roberts' opinion in
20 Footnote 4 sort of dodges the military academies issue, it
21 remains to be seen for another day to what extent private
22 universities are on the same footing with military academies
23 when it comes to these issues, is the point.

24 MR. GARDNER: Sure, Your Honor, but the fact that --

25 THE COURT: As you've noted in your papers.

Preliminary Injunction Hearing 12/14/23

1 MR. GARDNER: Yes.

2 THE COURT: Okay. So I'm not sure you can go with
3 the matter of delay when it comes to this. You've actually
4 moved pretty quickly, it seems to me. Chief Justice Roberts'
5 opinion was June 29th and they filed a lawsuit here in this
6 court October the 6th, and that includes summertime, so that's
7 a pretty quick turn around, it seems to me.

8 MR. GARDNER: Your Honor, if you measured it from the
9 Harvard decision, but I will respectfully suggest that
10 measurement from the Harvard decision is irrelevant because
11 what plaintiff's argument is is they essentially wanted for
12 strategic reasons to get the benefit of the Harvard decision to
13 then make their claims here, you know, more strong, I guess is
14 the better word. Terrible language on my part, but you
15 understand what I'm saying.

16 That's a strategic call, Your Honor. That's not a legal
17 call. There is nothing that prevented plaintiffs from
18 challenging the Naval Academy's consideration of race at the
19 same time that they challenged Harvard and UNC. And they knew
20 that UNC considered race because they responded to the
21 Solicitor General's amicus brief more than a year and a half
22 ago when they were litigating in the Harvard and UNC case.

23 So the fact that the Harvard case carved out the service
24 academies tells this Court nothing about the unjustified delay
25 in waiting years to bring this lawsuit. And again, what we're

Preliminary Injunction Hearing 12/14/23

1 talking about now is not the merits, just irreparable harm for
2 purposes of the extraordinary remedy of a mandatory injunction.
3 And because plaintiffs cannot explain at all any nonstrategic
4 reason for that delay, that should weigh against the imposition
5 of a preliminary injunction. They cannot show irreparable
6 harm.

7 Members A and B also claim that the alleged future lost
8 opportunities to compete on a racially equal footing
9 constitutes an irreparable injury sufficient to establish
10 irreparable harm. But the cases the plaintiffs cite to are all
11 distinguishable because in all of the cases they cite to, the
12 opportunity would be forever foreclosed.

13 So for example, in the Foulke case they cite -- it's from
14 the Southern District of New York -- a five-year-old child had
15 an offer of acceptance that was revoked and if she did not get
16 in that year, she would be forever barred from getting in.

17 Similarly in the D.M. case from the Eighth Circuit that
18 they cite to, two high school junior boys wanted to participate
19 on the dance team and if they did not get a preliminary
20 injunction getting them in immediately, they would have lost
21 the opportunity to compete both their junior and senior year;
22 in other words, those opportunities would have been forever
23 foreclosed.

24 And in the two cases they cite from the Court of Federal
25 Claims and the Eastern District of Virginia, Serco and Georgia

Preliminary Injunction Hearing 12/14/23

1 Vocational Rehab, those cases involved bidding on a particular
2 contract and if the Court did not issue a preliminary
3 injunction, they would have been forever foreclosed from
4 bidding on that contract.

5 Here, as we discussed earlier, plaintiffs have every
6 opportunity to reapply up until the age of 23. And although we
7 don't know their ages because, again, their bare-bones
8 declarations don't say it, I think we can assume that because
9 one of them applied last year and one of them applied this
10 year, they've got to be close to 18 or 19 years old. So the
11 bottom line is this is not --

12 THE COURT: Correct me if I'm wrong. I believe that
13 there is specific reference to Member A currently attending
14 college and is a midshipman in the Naval Reserve Officers'
15 Training Corps.

16 MR. GARDNER: That's right.

17 THE COURT: And Member B is now a freshman in
18 college. So both of them have clearly graduated from high
19 school.

20 MR. GARDNER: And no dispute there. My only point is
21 they are likely 18 or 19 years old. They're nowhere close to
22 the 23-year age limit.

23 So again, when we're just talking about irreparable harm
24 now, not standing, the question is, have plaintiffs been
25 diligent in pursuing their rights and, I think more

Preliminary Injunction Hearing 12/14/23

1 fundamentally, if this case were to proceed to final judgment
2 without a preliminary injunction, could their harms be
3 resolved? And the answer here is, yes, they could.

4 And so the Government's position is that this case should
5 proceed on the normal course and if a final judgment is
6 ultimately issued against the Government, they will obtain all
7 the relief that they are seeking.

8 THE COURT: Thank you, Mr. Gardner.

9 Mr. Norris, do you want to be heard further on this?

10 MR. NORRIS: Please, Your Honor.

11 THE COURT: Do I have that correct? I believe
12 through my notes here your complaint is noted, I believe, or in
13 the papers that Member A is currently attending college and he
14 or she is a midshipman in the NROTC, correct?

15 MR. NORRIS: Correct, Your Honor.

16 THE COURT: And the other, Member B, is now attending
17 another college and is a freshman in college, correct?

18 MR. NORRIS: Correct.

19 THE COURT: So they certainly would have ample time
20 to, depending upon the ruling of this Court and the validity or
21 lack thereof of any kind of racial considerations, would still
22 have time to apply to the Academy if they so chose, correct?

23 MR. NORRIS: That's correct, Your Honor. This case
24 won't become moot if they miss this cycle, but that doesn't
25 mean the irreparable harm would go away.

Preliminary Injunction Hearing 12/14/23

1 THE COURT: I know. The point is -- essentially your
2 point is is if there is a constitutional violation for even a
3 minimal period of time then there is an irreparable injury.

4 MR. NORRIS: Absolutely. And if I could just -- one
5 point about the length of the so-called delay.

6 THE COURT: Sure.

7 MR. NORRIS: Your Honor's Roswell case, the delay was
8 over a year. The Benisik case my friend just cited, the delay
9 was over six years. We think our delay at most was two months.
10 Harvard was a bombshell about whether the service academies
11 could continue to use race. Grutter was the existing law, said
12 they could. Harvard overruled the existing rationale for why
13 that legal regime could exist.

14 Then, we really were not sure whether the military
15 academies would read Harvard and then use race for the 2024
16 admissions cycle. They told the press in August for the first
17 time that they would use race in 2024 after reviewing Harvard.
18 So then 60 days later is when we sued and sought a preliminary
19 injunction. I know my friends can't think 60 days is
20 unreasonable because they asked you for 60 days just to
21 respond.

22 THE COURT: 60 days included August, and how would
23 you get anybody to really work? I mean, the partners, the
24 lawyers work in August but none of the older lawyers work in
25 August. I see people laughing here in the courtroom. It's

Preliminary Injunction Hearing 12/14/23

1 impossible to get an older lawyer to work in August. After a
2 certain age, it's just not going to happen.

3 (Laughter.)

4 MR. NORRIS: Your Honor, this is not an evidentiary
5 hearing but I'll submit the bags under Mr. Anderson's eyes are
6 proof that we worked really fast and really hard.

7 THE COURT: I noticed Mr. McCarthy and Mr. Gardner
8 were both looking down when I made that comment about how much
9 they worked in August. We're all laughing here.

10 well, thank you very much, Mr. Norris, on that.

11 MR. NORRIS: Thank you.

12 THE COURT: And I think again, the irreparable harm
13 here is all four criteria have to be satisfied here, and on
14 irreparable harm it really is very much dependent upon whether
15 or not there is a likelihood of success on the merits with
16 respect to the constitutional claim.

17 The record does reflect that Member A and Member B, who
18 are specifically referenced in this matter, one is at NROTC at
19 another college and the other is a freshman in college, so
20 there's plenty of time depending how this case plays out, and
21 that's why probably my strong view that this case isn't going
22 to take five years to resolve probably should be of good use to
23 them in some way.

24 And I think that the same analysis applies with respect to
25 the balance of the equities here, that balancing the harm to

Preliminary Injunction Hearing 12/14/23

1 the plaintiff if the injunction is erroneously denied versus
2 harm to the defendant if the injunction is erroneously granted.
3 And I think that that's some of the Planned Parenthood
4 litigation of recent years and certainly again the balance of
5 the hardships would weigh in favor of the defendant. But once
6 again, it depends upon whether or not there's a constitutional
7 violation, as Mr. Norris has aptly noted. So it also is
8 dependent upon the analysis as to the likelihood to succeed on
9 the merits.

10 And public interest, I would just note, the defendants
11 have argued that public interest is of paramount import in
12 matters of national security, and essentially the defendants
13 are arguing national security. The plaintiff is asserting
14 constitutional violation. I don't know that any decision
15 exactly has an immediate effect upon national security. But
16 obviously, as we'll be discussing in a few minutes, the matter
17 of commissioning of officers in the military and the
18 considerations that go into that certainly have national
19 security implications in terms of the diversity of the Officer
20 Corps and what have you in the military.

21 So again, I will be dealing with this and ruling as a
22 matter of record here before we finish today but will be
23 following up with an opinion.

24 So with that, I think that we are ready to wade into the
25 main issue here that clearly has dominated the briefing by both

Preliminary Injunction Hearing 12/14/23

1 the plaintiff and the defendant, by the Government -- I say the
2 Government, the Academy -- and that is the likelihood of
3 success, likelihood to succeed on the merits. Specifically,
4 the standard is whether or not the movant is likely to succeed
5 on the merits and likelihood of success on the merits of the
6 case with respect to the constitutional challenge here in light
7 of the Harvard case.

8 So with that, with the plaintiff bearing the burden of
9 seeking this extraordinary remedy, Mr. Norris, I'll be glad to
10 hear from you, and your point is to clear a likelihood of
11 success on the merits, and then I'll hear from Mr. Gardner.

12 As to this, I would just certainly note that with respect
13 to the factors to be applied here, everyone agrees that with
14 respect to the standard to be applied here, there's no question
15 that it's a matter of strict scrutiny. That's the standard.

16 You agree with that, correct, Mr. Gardner?

17 MR. GARDNER: Absolutely, Your Honor.

18 THE COURT: No question about that. It's strict
19 scrutiny. It's not just intermediate scrutiny; it's strict
20 scrutiny in light of the allegations here.

21 And, Mr. Norris, I'll be glad to hear from you.

22 MR. NORRIS: Yes, Your Honor. I count five ways that
23 the Harvard opinion says that race-based admissions are
24 unlawful. We think Navy has all five problems. I'll just take
25 them in any order Your Honor would like to go in. I've got my

Preliminary Injunction Hearing 12/14/23

1 own order I think from easiest to hardest.

2 THE COURT: As to that, you go with whatever order
3 you want.

4 MR. NORRIS: Thank you, Your Honor.

5 First, Navy uses race as a negative. Harvard says
6 universities necessarily use race as a negative if they use it
7 to benefit some applicants in a zero-sum process. Navy
8 concedes it uses race as a benefit. It concedes its process is
9 zero sum. Only about 10 percent of people who apply actually
10 get into Navy, and it concedes that if it switched to
11 race-neutral alternatives, more white students would get in
12 than would get in now, which Harvard says by definition means
13 their race is being held against them as a negative.

14 That's a very clear violation of Harvard. I don't think
15 they have an answer except to say, well, we have a footnote
16 that says the opinion doesn't decide one way or the other about
17 the military academies. That's very true, but the Supreme
18 Court did not say that they would get a pass on narrow
19 tailoring, which is what this requirement goes to.

20 I think the second violation is that Navy concedes it uses
21 the same racial categories that UNC and Harvard were using to
22 sort students. Those categories come from the federal
23 government itself. Civilian universities have to use them
24 under a system called IPEDS where they have to report their
25 data to the feds. They use it because the census uses it and

Preliminary Injunction Hearing 12/14/23

1 because they are the federal government.

2 But Harvard calls those categories arbitrary, incoherent,
3 irrational, and both over- and under-inclusive. They are not
4 tailored to any goal and they certainly were never designed to
5 achieve military objectives. That was not why they were used.
6 They were used by the Government as sort of broad catchalls to
7 loosely categorize people for purposes of the census, not for
8 military readiness, cohesion, or any other purpose. The
9 Supreme Court said the very use of those categories makes it
10 impossible for us to decide -- to measure whether you are
11 satisfying your goals and is a big disconnect between your
12 stated interests and your means of achieving them.

13 And I think the Navy's actually even worse than Harvard on
14 this. Throughout their brief they don't just use those
15 categories. They categorize people into two groups: minority
16 and nonminority. If you look at their brief, part of their
17 process has school officials check a box yes/no, are you a
18 minority or not. Not what race are you but, yes or no, are you
19 a racial minority?

20 And then they group everyone together in terms of the
21 numbers that they use to see whether they are meeting their
22 metrics, and they even use the term "nondiverse" to refer to
23 certain people. Certain people are nondiverse in their eyes.
24 That term appears throughout their brief. Just kind of a wild
25 thing to say about individual human beings. But they really

Preliminary Injunction Hearing 12/14/23

1 bifurcate people into two groups, which that kind of crude
2 sorting is not tailored to any goal. But even if you just
3 stuck them with the categories, the categories the Supreme
4 Court has already rejected.

5 Third, Navy does not have either a logical end point or a
6 sunset date on its use of race. It concedes it has no sunset
7 date. It says it engages instead in periodic review of its use
8 of race, which Harvard says is not sufficient to satisfy the
9 Constitution, and it does not say that it plans to stop using
10 race anytime soon, which Harvard says violates narrow
11 tailoring.

12 Even if they had a sunset date, they had no logical end
13 point for the same reasons that Harvard and UNC didn't. Their
14 interest is tied to balancing the racial makeup of the Officer
15 Corps against the racial makeup of the general population and
16 perhaps also the Enlisted Corps. It is tied to an ever-moving
17 target, which means it will constantly have to readjust and
18 apply race to get the numbers right. Harvard says that's
19 exactly why those universities failed narrow tailoring. The
20 same analysis applies here.

21 Fourth, Navy gives benefits based on race, what Harvard
22 called "race qua race." You get a benefit because of your race
23 and for no other particularized, individualized reason.
24 Harvard says that's illegal racial stereotyping. It at a
25 minimum assumes that there's something that makes racial

Preliminary Injunction Hearing 12/14/23

1 minorities, because of their race, "different from
2 nonminorities." That's what Harvard says is the first illegal
3 racial stereotype.

4 They also engage in the exact same racial stereotype that
5 Harvard and UNC did. They assume that if you increase racial
6 diversity by using race you will increase overall diversity,
7 which is diversity of thought, experience, identity, viewpoint,
8 all of those things. That actually relies on a hidden
9 stereotype that because of someone's race that they will come
10 with a specific view or identity or background and you can
11 reliably predict that based on race alone. Harvard says that's
12 an illegal stereotype.

13 But the Naval Academy really invents a couple of new
14 stereotypes that aren't even addressed in Harvard: They assume
15 that racial minorities, because of their race, care about the
16 precise racial mix of the Officer Corps coming out of the Naval
17 Academy; they assume that minorities are more likely to follow,
18 trust, or respect officers of the same race rather than instead
19 of on their leadership abilities; they assume that people of
20 one race are more likely -- racial minorities are more likely
21 to prefer mentors of the same race, which is why they're more
22 likely to stay in the Navy longer; they assume that minorities
23 look at the racial makeup of the Naval Academy and then decide
24 whether to join the military instead of based on other concerns
25 like duty or wanting to serve their country.

Preliminary Injunction Hearing 12/14/23

1 And again, this is they are making assumptions about a
2 group writ large, treating people as members of a racial group
3 instead of looking at them as individuals. They do not make
4 those assumptions about white applicants which Harvard calls
5 illegal racial stereotyping.

6 And lastly, which I think Your Honor got to at the
7 beginning of our last discussion, Navy's interests are not --
8 cannot be meaningfully subjected to judicial review, the
9 measurability point that the Court made in Harvard. I don't
10 even think courts can measure the ends that Navy is seeking. I
11 don't know how a court is able to tell whether the military is
12 sufficiently lethal, sufficiently cohesive, sufficiently
13 attractive to racial minorities and others, or sufficiently
14 legitimate in the eyes of the public or the international
15 community. That's not law. That's not things that courts are
16 able to assess reliably. But even if you could assess those
17 ends, the question is whether you can assess the means and
18 whether the means achieve those ends.

19 So the test under Harvard the Navy has to satisfy is that
20 their use of race in admissions is necessary to achieving those
21 ends, which means it's really a question of the delta. What do
22 our racial numbers look like if we stop using race and crank up
23 race-neutral alternatives versus what do our racial numbers
24 look like if we use racial preferences, and is the delta
25 between those two things going to stop us from achieving our

Preliminary Injunction Hearing 12/14/23

1 compelling interests.

2 Now, I don't know how a court could ever determine that.
3 I don't even think they have an expert or anyone who even tries
4 to determine that. Harvard says that's even more impossible
5 than the original task of measuring their ends. And really the
6 proof positive that you can't do that as a court is that Navy
7 doesn't even try to answer that question. They don't even tell
8 you what their racial numbers would be if they turned off
9 racial preferences and cranked up race-neutral alternatives.

10 Now, we have a pretty good idea of what they could achieve
11 because the Coast Guard was banned by Congress for quite awhile
12 from using race in its admissions process. During that time
13 the Coast Guard made a concerted effort to ramp up its
14 race-neutral alternatives, and it got almost to parity with
15 West Point in terms of the racial minorities who attended
16 there. They don't explain why they can't do the same thing.
17 They don't even give you the numbers that you would need to
18 make that determination. Even if they had those numbers, they
19 don't have a study or an expert who even studies the use of
20 race in admissions, the core question in the case.

21 They have some experts who discussed the concept of
22 overall diversity, diversity of thought, viewpoint, et cetera,
23 and they have some experts that talk about the presence of
24 racism in the military and racist views and exclusions. But of
25 course Navy will still be a very diverse place without racial

Preliminary Injunction Hearing 12/14/23

1 preferences, just like the University of California, the
2 University of Florida, all sorts of places where the use of
3 race in admissions is banned. They are still incredibly
4 diverse places. The question is whether the difference between
5 that system and this system is going to prevent it from
6 achieving its interest. Nobody tries to measure that. No one
7 even tries to tell you what the minimum level of racial
8 diversity in the Officer Corps coming out of the Naval Academy
9 needs to be. They don't even give you a number.

10 And their experts don't consider race-based admissions,
11 which is important because the Supreme Court in cases like
12 Adarand and Croson says that it's not just about diversity.
13 Diversity doesn't just materialize and now you have a diverse
14 system. It's about how you got diversity. And if we're using
15 explicit racial preferences, that has counteracting costs.
16 Racial preferences cause stigma, they cause resentment among
17 the people who don't get them, they reenforce the notion that
18 race is relevant and is a basis that you should treat people
19 differently upon. They have costs that counteract their goals
20 that they say that they are pursuing.

21 Now, they also give you some metrics, some alternative
22 metrics they say you could use to measure whether they are
23 achieving their goals. Some of them are downright
24 indefensible, like the presence of race riots in the Navy. If
25 there's no race riots then they must be narrowly tailored to

Preliminary Injunction Hearing 12/14/23

1 achieving their interests. That doesn't make any sense. The
2 presence of race riots or not doesn't even try to measure the
3 delta that I've been talking about, and no serious person
4 thinks that the Navy is not having race riots because the Naval
5 Academy uses race in some parts of its admissions process.
6 It's just silly to even say out loud. And, you know, of course
7 the Coast Guard was not having race riots either when it was
8 strictly race-neutral up until 2010.

9 THE COURT: Are you suggesting, Mr. Norris, that
10 there has not been issues of race in the military?

11 MR. NORRIS: Not suggesting that at all, Your Honor.
12 I'm suggesting that they can't say that race-based admissions
13 at the Naval Academy is either solving those problems, that
14 they would be worse without that process, or they'd be better
15 because of it.

16 THE COURT: Nor can you at that point say they do.

17 MR. NORRIS: Well, I have the burden to --

18 THE COURT: You talking about assumptions on one side
19 and then, with all due respect to you, Mr. Norris, you have the
20 same assumptions on the other. I mean, you just can't stand up
21 here and avoid and say, well, that's really not happening. I
22 mean, how could anybody possibly say that? Anybody my age
23 knows of all the racial tensions during the Vietnamese war was
24 an absolute given. There's no one who would seriously contest
25 that.

Preliminary Injunction Hearing 12/14/23

1 MR. NORRIS: Absolutely.

2 THE COURT: Just let me finish. No one would
3 seriously contest that. So I've heard what you have to say,
4 but you're rambling on with your assumptions and talking that
5 they haven't proved their assumptions. You're the plaintiff.
6 You have a burden. And the burden is here to get an
7 extraordinary remedy to ask me to issue an injunction.

8 And so the burden is upon you. It is a heavy burden. So
9 I think you need to tread softly when you talk about the
10 assumptions they're making because you are now off at the end
11 of the diving board making your own assumptions. And to the
12 extent that you suggest for a minute that there's not been any
13 racial tension in the military, I'm afraid, sir, based on my
14 own personal experience that is just totally baseless. We'll
15 deal with that down the road. But to even suggest that is -- I
16 don't want to say it's absurd, but it is a stretch to suggest
17 there hasn't been racial tension. Of course there's been
18 racial tension.

19 MR. NORRIS: I did not mean to suggest that, Your
20 Honor. I meant to say if there is or isn't, they have to tie
21 it to their use of race-based admissions as the solution.

22 THE COURT: I'm trying to help you with this. For
23 you to say Harvard fits perfectly into it, people at Harvard
24 and UNC are not necessarily leading people into combat. Do you
25 understand?

Preliminary Injunction Hearing 12/14/23

1 MR. NORRIS: Yes, Your Honor.

2 THE COURT: They're not leading people into death
3 situations. And so to that -- and it's a very serious issue
4 that I'll have to deal with, but to just say you just fit like
5 a cookie cutter Harvard in here and here it is, I waited -- I
6 made a note. My note here says, "How long will he take before
7 he talks about race situations?" And I noted you were about to
8 go right past it. And, quite frankly, that's why we're having
9 this hearing because I'm not going to let you go right past it.
10 That's a very crucial fact.

11 I've looked at the complaint filed in this case, and I
12 would note that Page 11 of the complaint, it's specifically
13 noted in your complaint that you filed that "racial parity
14 based on general population is not enough" and that it must
15 reflect the diversity of the enlisted ranks. That's
16 essentially the thrust of it.

17 And your point is well taken with respect to Chief Justice
18 Roberts' opinion in the Harvard case, where is the logical end
19 point? Because your point is well taken. How is there ever a
20 logical end point because these matters are in variance. It's
21 something that's very much before the Court because it's a
22 given there has been a challenge to the all-volunteer force.
23 You concur with that?

24 MR. NORRIS: Yes, Your Honor.

25 THE COURT: All right. And you've said so in your

Preliminary Injunction Hearing 12/14/23

1 complaint. There are difficulties with respect to the
2 all-volunteer force, and essentially there's some reference in
3 your complaint, your complaint on Page 16 to the Navy facing a
4 crisis with an all-volunteer force, correct? That's what
5 you've alleged in your complaint?

6 MR. NORRIS: Yes, Your Honor.

7 THE COURT: All right. So that's my point is that
8 these problems have been exasperated, and in terms of the
9 merits of this case, it is fundamental of which before the
10 Court is to try to deal with this in terms of how the Naval
11 Academy is seeking to deal with it and whether or not it
12 warrants support or whether or not it survives strict scrutiny.
13 And whether or not it survives strict scrutiny, as you've aptly
14 noted in your papers, is going to depend upon the results of
15 these.

16 But to say that we just stick in Harvard and it's
17 speculative as to racial tension, I'm just afraid that the
18 history of the American Military, and certainly since the
19 Vietnam War, is not the case. That doesn't mean that the
20 Government walks free of this because the Government might have
21 to explain according to its own papers why in terms of the
22 officers of flag rank overwhelmingly come from the Naval
23 Academy and officers in terms of the Chief of Naval Operations,
24 something like 91 percent of all of them come from the Naval
25 Academy. They don't come from the enlisted ranks, climbing the

Preliminary Injunction Hearing 12/14/23

1 ranks. They don't come from the ROTC programs.

2 All of those are valid facts that the plaintiff is free to
3 explore, but I think that to just say that you just fit in
4 Harvard and that there's not been any issue or the Government
5 is suggesting and speculating that there hasn't been an issue
6 recently, that doesn't really solve the problem. To suggest
7 that because there haven't been any race riots that really the
8 problems are exaggerated, the problems are never exaggerated in
9 the extent of individuals who are leading people into combat
10 situations where they may die.

11 And so that's the focus you have here and the
12 extraordinary relief to summarily say we just fit Harvard in
13 and the distinct possibilities that are unique to the military
14 academies is something you must address. And I do think your
15 point is well taken with respect to where does it end. That's
16 a very good point. But we're going to have to figure out where
17 it ends vis-à-vis the military because it does seem like it's a
18 shifting sand constantly. But I don't think you can just blow
19 past a matter of racial tension in the military.

20 MR. NORRIS: No, Your Honor. I misspoke. I was
21 trying to characterize their argument, not say that these are
22 not real problems. I was trying to say that they don't have
23 the solution, and the solution is not race-based admissions.
24 At least a court could not measure whether race-based
25 admissions are the solution. I think that was the Chief

Preliminary Injunction Hearing 12/14/23

1 Justice's point.

2 THE COURT: well, I guess we'll get down there. I
3 don't know that that's correct, Mr. Norris. I don't know that
4 Chief Justice Roberts' language in Footnote 4 means that a
5 court can't assess it. It means a court does its best to
6 assess it, and that's really going to be the task here in this
7 litigation.

8 To the extent that you have consideration of race with
9 respect to Naval Academy midshipmen, how does that translate up
10 the line? Somewhere along the way there is reference to the --
11 I saw in the papers here the matter of the -- essentially going
12 up the tunnel, and I made a note. Essentially how far up the
13 tunnel do you go, I guess is the point in terms of it's going
14 to be very interesting to see what the level of racial
15 diversity is as you go up the ranks and whether or not the
16 racial diversity of the Officer Corps, whether the racial
17 diversity of flag rank officers and the source of flag rank
18 officers, whether or not that can match the level of diversity
19 on the lower ranks. Because there clearly is tension in that
20 regard. And that's the point I was just trying to make sure we
21 don't just blow past that because that's a very important fact.

22 MR. NORRIS: Absolutely. One thing the Chief Justice
23 does say, though, is that an institution with such history of
24 racial tension and problems with race is the very last one you
25 should trust and give deference to in how they use race. I

Preliminary Injunction Hearing 12/14/23

1 think that's an important point not to lose.

2 But Your Honor's point about the numbers as you go up the
3 chain is important, too. The Naval Academy says one way you
4 can figure out whether we're doing a good job is you can just
5 defer to the military, which that's not -- that doesn't make
6 their interest measurable. That's just a refusal to measure.
7 That's not what Harvard says is the test for narrow tailoring.
8 But then they say you could look at our numbers, look at
9 whether we're achieving racial diversity in the Officer Corps,
10 in our admitted class, and up the chain. And I would
11 respectfully submit, Your Honor, that the Naval Academy, which
12 it does have the burden under strict scrutiny even though we
13 have the burden on the PI, they have not come forward with that
14 evidence. And so for one, that evidence is --

15 THE COURT: Just so the public is clear, just so the
16 public is clear what you just said is absolutely accurate but
17 it means that you have the burden here to come into court this
18 afternoon and ask me to issue a preliminary injunction. You
19 have that burden to prove likelihood of success on the merits.
20 Your point is well taken in terms of the course of discovery
21 and how this case plays out in terms of a bench trial if the
22 Government can have its policy survive strict scrutiny, but not
23 this afternoon is the point.

24 MR. NORRIS: Right, Your Honor. I believe the
25 technical legal question would be is have we proved that it's

Preliminary Injunction Hearing 12/14/23

1 likely that they will not be able to prove that they satisfy
2 strict scrutiny?

3 THE COURT: well, I think to make it easier for the
4 public if they're listening in, again, it's that you have to
5 today show likelihood of success on the merits in order to have
6 the extraordinary relief of me summarily issuing an injunction.

7 Your point is well taken in terms of the issue of strict
8 scrutiny. And I'm throwing this out so you understand where
9 I'm coming from, and I want to make sure Mr. Gardner and the
10 lawyers in the Department of Justice understand that you have
11 to follow the chain, so to speak.

12 You know, to the extent that you have -- in terms of
13 strict scrutiny, to the extent you have the proffer of this is
14 the policy here for racial diversity in the Officer Corps to
15 equal the enlisted ranks to lessen racial tension which has
16 existed in the military and still exists in the military,
17 that's a matter that has to survive strict scrutiny and that's
18 going to be the analysis. And it will be very interesting as
19 this case proceeds as far as I'm concerned as to what the
20 implications are when 91 percent of all of the Chiefs of Naval
21 Operations -- and this is according to the defendant's
22 memorandum, says 91 percent of all those Chiefs of Naval
23 Operations have been Naval Academy graduates.

24 MR. NORRIS: Yeah.

25 THE COURT: And I'll just note -- I don't mean to

Preliminary Injunction Hearing 12/14/23

1 interrupt you. Let me finish my thought. And that there's a
2 disproportionate number of flag officers. For the public, that
3 means becoming an Admiral or above. And something like 40
4 percent of all those are from the Naval Academy. They're not
5 people who were in the enlisted ranks and were commissioned.
6 They're not from ROTC officers. They're not from universities.
7 They are numbers that the Government itself -- I say the
8 Government, the Naval Academy has cited, and there may be some
9 implications to that down the road when you really get deep
10 into the merits of the case. That's the point I'm just trying
11 to emphasize now for the purpose of public consumption.

12 MR. NORRIS: Yes, absolutely. And it's interesting
13 that the citation of numbers starts to drop out as they go up
14 the chain in their brief. So I would submit that they have to
15 prove that their use of race in admissions at the Naval Academy
16 is necessary at a minimum to achieve racial diversity in the
17 Navy.

18 So that's difficult because if you look at their numbers
19 of admissions, they say that Black Americans are 14 percent of
20 the population and yet are 6 percent of admissions to the Naval
21 Academy. They're not even hitting 50 percent of what they say
22 their goal is.

23 Then as you go up to the chain of officers in the Navy,
24 the Naval Academy accounts for only about 1 in 5 officers in
25 the Navy and 1 in 6 officers in the Marines. If they were 100

Preliminary Injunction Hearing 12/14/23

1 percent racial minorities they still would not make a
2 meaningful difference to the overall racial makeup of the
3 officer Corps.

4 Then here's where the numbers drop out. How do they
5 contribute, then, to the racial diversity of the high-ranking
6 officers? We don't have any numbers about what their diversity
7 is because their experts even let on that those numbers are not
8 diverse whatsoever. And one reason our expert -- who is a
9 three-star General who's got experience on the Army side but
10 has looked at all of this, he says that the Army and the Navy
11 are not actually quite committed to this interest because they
12 don't racially balance the units, they don't racially balance
13 the formations, they don't racially balance the missions, and
14 they don't use race purportedly when they make promotion
15 decisions to the higher-ranking officers. So I would submit --

16 THE COURT: Just so we're clear, I understand what
17 your argument is, and indeed you're referring to portions of
18 the Naval Academy's brief in this case on the numbers. And I'm
19 going to go over those numbers just to repeat in a minute
20 because your point's well taken, but what you're saying there
21 has to bear proof here in discovery in this case.

22 You know, in terms of exact -- I don't know -- as we sit
23 here, I don't know what the percentages are. Even the
24 defendant, the Academy has noted 1 out of 5 are from the Naval
25 Academy as officers. And the Academy has even in its papers

Preliminary Injunction Hearing 12/14/23

1 essentially has said white individuals make up approximately 59
2 percent of the population and 62.8 percent of Navy sailors and
3 56.5 percent of Marines and 75.5 percent of the Officer Corps
4 of the Navy and over 81 percent of the Marines.

5 So the Academy in its papers has bluntly acknowledged,
6 just for public consumption, the Navy has made progress in the
7 representation of Asian and Pacific Islander officers. It has
8 not achieved similar progress for Black officers, and that's in
9 the submission of the Academy.

10 So what you're saying there is absolutely correct, but my
11 point is we have to be careful for purposes of public
12 consumption where we are now as to what are these numbers, how
13 do they translate as you go up the chain because that is
14 relevant to the Court ultimately in terms of what this means in
15 terms of strict scrutiny when you start to apply these racial
16 factors.

17 But where we are now in terms of likelihood of success on
18 the merits, we have a lot of sea to cover, a lot of land to
19 cover to try to figure out what the numbers are here is the
20 point I'm trying to make, Mr. Norris, for purpose of public
21 consumption. And I'm not trying to interrupt you, but it's
22 important for the public to understand where we are on this
23 right now.

24 MR. NORRIS: That is important, Your Honor,
25 especially under cases like Parents Involved which says if

Preliminary Injunction Hearing 12/14/23

1 you're using the poison of racial classifications which come
2 with real, severe harms, then you need to at least be
3 accomplishing what you say you set out to do. And I would say
4 that the numbers that we've seen prove that the Navy is not
5 doing so and does not even actually follow through on its
6 supposed commitment after people graduate from the Naval
7 Academy, which is not how you satisfy strict scrutiny.

8 I'll just say the last thing that they say you should look
9 at to measure whether they're doing a good job is the surveys
10 they give to sailors about whether they're doing a good job.
11 In Harvard, that evidence was also before the Court. In
12 Harvard, the surveys about the diversity climate, that was not
13 sufficient to satisfy strict scrutiny. We don't normally poll
14 people about whether they're allowed to racially discriminate.
15 These surveys are particularly unreliable, as the GAO has said,
16 in terms of their response rate and all those things.

17 And I'll just say, it's interesting that the surveys don't
18 actually even ask the most obvious question, which is, should
19 the Naval Academy use race as a factor in admissions? They
20 don't dare ask that question. We know from the evidence that
21 the use of race in admissions is overwhelmingly unpopular among
22 people of all races and all partisan backgrounds. It is more
23 likely to decrease the legitimacy of the Army and Navy than
24 increase it.

25 THE COURT: well, your proffer of that fact will

Preliminary Injunction Hearing 12/14/23

1 await discovery in the case, the fact that you're proffering
2 that. And we know what your argument is and I don't know that
3 it necessarily has to be accepted by the public at this point.
4 That's what this case is about, essentially, I understand, but
5 that's your proffer as an advocate of what you believe the
6 facts are.

7 MR. NORRIS: And I don't believe that's disputed by
8 them, at least the way the public views the use of race.
9 There's no contrary evidence. But Your Honor started with I
10 think exactly the right point. This is a preliminary
11 injunction. You're being asked to predict who is likely to win
12 based on the more limited record you have now. It's not a
13 final determination on the merits. And I would say that we are
14 way ahead on the narrow tailoring and strict scrutiny prong.

15 And I think the last thing I'll say about the
16 measurability of their interests is if you thought they were
17 measurable -- which is a requirement from Harvard under strict
18 scrutiny is that courts have to be able to assess whether your
19 use of race is necessary. That's a bare minimum. But you can
20 go ahead and try to assess it. I think we have the better of
21 the debate in terms of the evidence that exists in the record,
22 but I think when you try to assess it you're going to find that
23 this is not something that courts can reliably do.

24 So in terms of their interests and cohesion, the use of
25 racial preferences is exactly contrary to what sailors and

Preliminary Injunction Hearing 12/14/23

1 soldiers are taught in basic training about forgetting your
2 individuality and becoming part of a group. It is more likely
3 to cause stigma and make people unfairly question the
4 qualifications of people of certain races. That's what our
5 General says in his expert declaration. It causes that stigma
6 that the Supreme Court predicted in cases like Adarand. The
7 military's success, even among people inside the military, our
8 General says no one has ever said I think that that unit failed
9 because it was not sufficiently racially diverse in terms of
10 its makeup. They fail because of bad leadership. Bad leaders
11 make bad leaders, not being a certain race or a different race.

12 And I think it's important, there's only two flag officers
13 who've submitted declarations in this case; our declaration and
14 then they have Admiral Fuller on that side. Admiral Fuller
15 does not sign on to the broad sort of conclusory statements
16 about diversity writ large that some of their other experts do.

17 He says in Paragraph 12 of his declaration that what
18 matters for the military is the leader's ability to "harness
19 diversity," and I think he goes on to say what he means by
20 that. He means a leader's ability to make people from
21 different backgrounds work together and resolve conflicts and
22 achieve the unified goal and mission. That's exactly what our
23 General says is what makes a good leader, but that's about
24 being a good leader, not having a particular skin color. I
25 think that's pretty obvious but it's backed up by both sides, I

Preliminary Injunction Hearing 12/14/23

1 think, in this case.

2 They also have an interest in recruiting and retaining
3 racial minorities in the Navy. The Supreme Court's decision in
4 Wygant says that that theory, the role model theory that people
5 won't join or stay unless they see people who look like them in
6 the ranks, that does not survive strict scrutiny. That's
7 really just racial balancing in disguise. It's not a
8 compelling interest.

9 Even if it were, they've cited evidence about the reasons
10 people give for why they joined or why they didn't join or why
11 they left the military. Racial diversity does not even crack
12 the list. And we have evidence. Exhibit Q that we've
13 submitted says that people are more likely to stay in the
14 military if they think it's a pure meritocracy and more likely
15 to leave if they think that merit is not being rewarded, which
16 tends to counteract the idea that racial preferences are a good
17 idea.

18 And they really don't even have what I will call macro
19 correlation between their means and their ends. So they are
20 using race now but recruitment in the Navy has never been
21 lower. I think there's not even a relationship between these
22 two factors that you could observe at the macro level. And the
23 reason it's so low is not -- you know, they can't solve it by
24 using race more, continuing to use race as a factor in
25 admissions. It's due to things like obesity, generational

Preliminary Injunction Hearing 12/14/23

1 gaps, and willingness to serve in the military, things like
2 that.

3 And then lastly, I think I've already gotten into this a
4 little bit, they say they have an interest in making the
5 military appear legitimate to the public. The public
6 overwhelmingly opposes the use of race by selective
7 universities, by employers, just about in every aspect of
8 society. I don't know how that increases legitimacy.

9 The Supreme Court in the Johnson case says the way to
10 increase legitimacy is to force institutions like prisons in
11 that case to strictly follow the principle of race neutrality.

12 And again, as a macro correlation problem, the public's
13 view of the military has almost -- in almost two decades has
14 never been lower despite their use of race, so the correlation
15 is off there. And the number one reason that's cited, and our
16 experts gets into this, is that people view the military as
17 overly politicized, which our expert says racial preferences
18 only contribute to that problem.

19 And the last thing I'll say is there's, again, a macro
20 correlation problem. One of the most respected units and most
21 well-known units in our US military are the Navy Seals. They
22 are not racially diverse, but they are still seen as
23 legitimate. They are still extremely lethal and effective on
24 the battlefield. I do not think under strict scrutiny that
25 they've proved a sufficient connection between their means and

Preliminary Injunction Hearing 12/14/23

1 their ends.

2 THE COURT: well, thank you very much, Mr. Norris.
3 And just, again, this will have to await -- there are a lot of
4 facts you proffered in your view as an advocate, some of which
5 may or may not be accurate, and I don't say that you meant that
6 intentionally. It's just that some of these are debatable
7 points.

8 You talk about the respect for the military is less. The
9 respect for the entire American Government is less. January
10 6th, for only the second time in our history, we had people
11 attack the Capitol. And I sit in an office where you are sworn
12 to support the Constitution against all enemies, foreign and
13 domestic. You had domestic enemies attack the Capitol. Only
14 other time anybody's ever attacked the Capitol, they were
15 British in 1814 and they came up to the harbor here in
16 Baltimore.

17 So the matter of lack of respect, I really don't think,
18 don't even try to in this case go the path what is the respect
19 for the military. The military is still far more respected
20 than the United States Congress, I can assure you. There's
21 probably no institution less respected right now than the
22 extremes that have been represented here. I'm not going to let
23 that pass.

24 So to throw out numbers about the respect for the
25 military, I'm afraid that applies to the American Government

Preliminary Injunction Hearing 12/14/23

1 across the board, across the board with the Executive Branch.
2 And even the Judicial Branch has taken hits on this and that's
3 because of a lot of nonsense thrown out there by people who
4 should know better.

5 So a matter of the loss of respect for the military has
6 nothing to do -- from my view, nothing to do with how we have
7 to analyze this case, but we just can't throw those numbers
8 out. So thank you for your advocacy, Mr. Norris.

9 MR. NORRIS: Thank you.

10 THE COURT: To the extent I corrected you on a few
11 things, it was because some things you said are your view and
12 are not facts, and so we deal with facts here. So I understand
13 what your argument is and it remains to be seen what the facts
14 are in the case.

15 And with that, Mr. Gardner, if you're still so inclined,
16 step into the barrel now with me.

17 (Laughter.)

18 MR. GARDNER: Your Honor -- I am --

19 THE COURT: I told you I have a hot bench, so I have
20 questions to ask.

21 MR. GARDNER: I am more than inclined and I am
22 absolutely ready and able to answer your questions to the best
23 of my ability.

24 THE COURT: That's fine.

25 MR. GARDNER: Plaintiff's entire argument proceeds

Preliminary Injunction Hearing 12/14/23

1 from two flawed assumptions. The first is that the Naval
2 Academy is like any other civilian educational institution, and
3 the second is that the Harvard decision should mechanistically
4 apply to the Naval Academy's consideration of race. Both of
5 those assumptions are fundamentally flawed.

6 And let me start at the very beginning. As Your Honor
7 acknowledged, unlike a civilian university, the Naval Academy
8 is training students to be officers to lead a lethal fighting
9 force. The Naval Academy is a critical pipeline for senior
10 Naval and Marine Corps officers in combat where approximately
11 95 percent of Naval Academy graduates are placed into the
12 war-fighting community. These are the service members who
13 pilot submarines, carriers, and serve as the tip of the spear
14 on the front lines of battle.

15 And as Your Honor noted, 40 percent of all senior Naval
16 flag officers are Naval Academy graduates. Because officers
17 cannot be recruited from outside the military, it is critical
18 that the military develop its officers internally.

19 THE COURT: Someday, Mr. Gardner, if not today, one
20 of these days down the road I'm going to ask you what
21 percentage of those officers are Black.

22 MR. GARDNER: Of the overall officer Corps?

23 THE COURT: Yes. I mean in terms how many Black
24 Admirals are there. These are things we're going to have to
25 deal with in this case. All these numbers sound fine and to

Preliminary Injunction Hearing 12/14/23

1 translate them and exactly how does this translate going up the
2 chain in terms of the 91 percent, or all of the Chief of Naval
3 Operations have all been Academy graduates, how many of them
4 were Black?

5 MR. GARDNER: That's precisely the issue, Your Honor,
6 because today's Naval Academy graduates are going to be the
7 senior Naval officers 30 and 40 years in the future. So this
8 isn't that we graduate a class in 2023 and, poof, in 2024, we
9 now have a diverse senior Officer Corps. That's the whole
10 point. It is a closed pipeline that takes decades to progress.
11 So plaintiff's suggestion that somehow the consideration of
12 race translates into a more diverse senior Officer Corps
13 tomorrow simply does not understand the Naval process or the
14 military process writ large.

15 THE COURT: Again, Mr. Gardner, to put as much
16 pressure on you as I did Mr. Norris, that will depend upon what
17 the facts in this case divulge about how many stay in the
18 Academy after -- how many people of minority, both Islanders,
19 Pacific Islanders and African Americans, how many stay in the
20 military after five years or how many dispair. I mean, I don't
21 know what the facts are. We're dealing in a vacuum here.
22 We're not going to decide this afternoon.

23 MR. GARDNER: Understood.

24 THE COURT: But I hear you saying these future
25 Admirals and these future Chiefs of Naval Operations, we'll

Preliminary Injunction Hearing 12/14/23

1 have to wait 30 years to see how it happens. well, one indicia
2 we're going to have to look at is exactly what is the -- what
3 is the percentage in terms of leadership positions and command
4 positions and how many people stay in the military, how many
5 people meet their five-year minimum and decide they've had
6 enough and leave? All of these things we don't know what they
7 are.

8 MR. GARDNER: I agree, Your Honor, and that's all the
9 more reason why issuing a mandatory preliminary injunction in
10 this context would be inappropriate.

11 But I think the punchline that I wanted to get to is given
12 the unique and critical role the Naval Academy plays in the
13 officer pipeline, senior military leaders have made the
14 judgment that the Naval Academy's limited consideration of race
15 in the admissions process is necessary to meet its critical
16 national security mission.

17 In particular, as Your Honor I think noted with my
18 colleague, the military has made a judgment that having a
19 racially diverse Officer Corps is necessary to build cohesive
20 teams critical to developing combat-ready forces, to aid in
21 officer recruitment and retention, and to foster domestic and
22 international legitimacy. And that military judgment, and I
23 didn't hear a lot about this from my colleague, is based on
24 history, real-world combat experience, as well as quantitative
25 and qualitative data.

Preliminary Injunction Hearing 12/14/23

1 Plaintiff essentially is asking this Court to force the
2 military to engage in an actual experiment where the military
3 should simply forgo its consideration of race and we'll see
4 what happens. But the Constitution simply does not require
5 such an unethical experiment that would use American service
6 members as Guinea pigs, particularly when the military has made
7 a judgment that the limited consideration of race is critical
8 for national security.

9 Now, I want to turn first to the compelling Government
10 interest because I didn't hear much about that from my
11 colleague. I think much of the focus was on narrow tailoring.

12 Like I said earlier, plaintiff's entire theory hinges upon
13 the notion that the Naval Academy is just like any other
14 institution and that the Harvard decision should
15 mechanistically apply to the Naval Academy. But there's at
16 least three critical differences between the Naval Academy and
17 what was at issue at Harvard.

18 And the first, I think Your Honor has identified multiple
19 times that in Harvard, the Court expressly carved out the Naval
20 Academy from consideration recognizing they could have
21 potentially different compelling interests. The eight
22 declarations we have provided to Your Honor conclusively shows
23 there is a very different interest here than what was at issue
24 in Harvard and UNC. And this is critically significant because
25 the narrowly tailored analysis in both Harvard and in Grutter

Preliminary Injunction Hearing 12/14/23

1 is necessarily informed by the nature of the interest asserted.

2 And as the Court recognized in Grutter, and I will quote
3 now, "Strict scrutiny must take relevance differences into
4 account and courts must calibrate their narrow tailoring
5 inquiry to the relevant context." That was at Page 327 of the
6 opinion.

7 I heard my colleague simply say Harvard applies without
8 any consideration for those very distinct and unique interests
9 at issue here.

10 THE COURT: Do I correctly understand, Mr. Gardner,
11 on this point that the matter of diversity is essentially the
12 Navy is looking at diversity based upon percentage of minority
13 participation in the enlisted ranks or is it basing it upon
14 percentage in the population at large? I thought I understood
15 there to be a view that you are looking at diversity in the
16 context of what is the diversity population, both Pacific
17 Islanders and African Americans, in the enlisted ranks. Is
18 that a significant factor or not?

19 MR. GARDNER: That's not correct, Your Honor. The
20 Navy has explained that it is looking at the general population
21 for its, you know -- sorry. It is looking at the general
22 population in assessing the diversity of the Officer Corps, and
23 that is the benchmark it has decided to use.

24 The second key distinguishing feature between Harvard and
25 this case is that unlike Harvard and Grutter, the military's

Preliminary Injunction Hearing 12/14/23

1 judgment in this case is entitled to substantial deference, and
2 that is a complete difference between the civilian educational
3 institutions in that case.

4 And what does that mean, to have substantial deference to
5 the military's judgment? well, one thing it means is as
6 Goldman said, the Supreme Court decision, this isn't a battle
7 of the experts, and it's entirely inappropriate to consider
8 plaintiff's rebuttal expert whose view is, in his judgment,
9 race shouldn't be considered, because in Goldman the Court held
10 that you must defer to the military's judgment. So that is
11 just one real-world consequence as to how military deference
12 comes into play.

13 THE COURT: well, again, in terms of public
14 consumption, I've read the papers with respect to the amicus
15 briefs filed in the Harvard case, and there was an amicus brief
16 I believe filed with respect to the Government amicus brief
17 that included declarations from many retired military officers,
18 including General Wesley Clark, for example, a former commander
19 of NATO, in terms of supporting some consideration of race.
20 But those affidavits aren't before me yet but they were
21 certainly in the record in the Harvard case. Were they not?

22 MR. GARDNER: They were. They were. And again, I
23 don't view those as being rebuttal expert opinions or anything
24 like that at all. I think that was simply trying to show
25 historically how, you know, the Naval academies -- the military

Preliminary Injunction Hearing 12/14/23

1 academies have considered race. What plaintiffs are doing is
2 something very different. They are seeking to have the Court
3 second-guess those military judgments through the submission of
4 an expert report, and that's exactly what Goldman says this
5 Court cannot do.

6 Finally, Your Honor, on the facts, the Naval Academy's
7 admissions policy is substantially different than the policy
8 that was struck down by the Court in Harvard. And with the
9 Court's indulgence, I think I need to back up a bit and explain
10 that there are some significant mischaracterizations of the
11 Naval Academy's admissions policy in plaintiff's reply brief.
12 And I want to be very clear I'm not casting aspersions.

13 THE COURT: I know. I understand.

14 MR. GARDNER: But I do think I need to clarify the
15 record.

16 First, plaintiff repeatedly states that the Naval Academy
17 considers race as a "plus factor." Dean Latta's declaration
18 conclusively refutes that characterization.

19 THE COURT: He's the Dean of Admissions at the
20 Academy.

21 MR. GARDNER: Yes. And as he notes in Paragraph 78
22 of the declaration and consistent with the admissions guidance,
23 Paragraph 5, the Naval Academy uses a wholistic approach in
24 which at no point, and I'm quoting now, "during the admissions
25 process should race, ethnicity, or gender be the basis for

Preliminary Injunction Hearing 12/14/23

1 points in favor of or against an applicant. Such factors may
2 only be considered as one of many nondeterminative factors in
3 the applicant's file."

4 Second, Your Honor, plaintiff mischaracterizes the Letter
5 of Assurance or LOA process and contends, and I want to quote
6 here directly from what they say, "Race is particularly
7 important when candidates fall below the whole Person Multiple
8 score that is typically required for an LOA." That's on Page
9 13 of their reply brief.

10 The evidence contradicts that statement. As Dean Latta
11 explains in his declaration in Paragraph 74, it is not that
12 race is particularly important for whole Person Multiples under
13 70,000. Rather, for applicants who have scores over 70,000,
14 those students are deemed "well qualified" and less of a
15 wholistic analysis is necessary there because those are sort of
16 the top-scoring candidates.

17 But for students with scores below 70,000, a more
18 wholistic assessment of every candidate is conducted. It's in
19 that context, that wholistic assessment for those under 70,000,
20 where race can be one of many nondeterminative factors. And
21 that also includes, Your Honor, factors like unusual life
22 experience, interest in STEM, the ability to speak multiple
23 languages, among many other factors, and Dean Latta explains
24 that in Paragraph 67 of his declaration.

25 THE COURT: And as to a superintendant nomination, it

Preliminary Injunction Hearing 12/14/23

1 may depend upon his or her athletic ability.

2 MR. GARDNER: Generally speaking, Your Honor, the
3 superintendant nominations are given to Blue Chip athletes.

4 THE COURT: Sure.

5 MR. GARDNER: And they're very sparingly given. And
6 what the record reflects is that since 2008, no superintendant
7 nominations reflected any consideration of race. So that
8 process I don't understand them to really be challenging
9 seriously.

10 But here I think is the kicker about the LOAs. Even where
11 race can be one of a multitude --

12 THE COURT: LOAs stands for Letters of Admission.

13 MR. GARDNER: Letters of Admission, that's right, and
14 that was one of the things they were talking about earlier,
15 that even where race is a consideration in the Letters of
16 Assurance -- I'm sorry, Letters of Assurance. I'm sorry, not
17 Letters of Admission. Letters of Assurance.

18 Even where race can be considered, candidates may not
19 receive an LOA because of their race and white applicants are
20 equally eligible to receive LOAs with scores under 70,000, and
21 Dean Latta explains that in detail in Paragraph 74 of his
22 declaration.

23 Just two more quick points, Your Honor, I want to clarify
24 about the admissions process because I think this is important.

25 Plaintiff's next claim that race can be a "tie breaker" in

Preliminary Injunction Hearing 12/14/23

1 considering out-of-order nominations, that contention is also
2 contradicted by the record. The key consideration for these
3 out-of-order selections includes, among other things, class
4 rank, grades, progression through academic subjects, and
5 leadership experiences, among others.

6 Although race can be one of many factors considered as
7 part of that wholistic review, it is not a plus factor, and
8 when race is considered, it is not determinative and offers are
9 not provided because of the candidate's race. That's in
10 Paragraph 58 of Dean Latta's declaration.

11 In addition, Your Honor, I think this is important,
12 out-of-order admission offers are extended to white applicants
13 as well as minority applicants based on that same wholistic
14 assessment. And even where the higher-scoring whole Person
15 Multiple applicant isn't initially selected, that candidate may
16 still receive an offer as either a qualified alternate or as an
17 additional appointee. And so the bottom line here, Your Honor,
18 is that both the higher- and lower-scoring applicant would be
19 admitted in that circumstance and no one is being displaced as
20 plaintiff suggests.

21 Finally, and I think this is important in terms of the
22 urgency of this motion, plaintiffs repeatedly state in their
23 briefing, particularly in their reply, that the Naval Academy
24 selection process for "general admissions" begins on February
25 1st. I do not understand plaintiff's attached significance to

Preliminary Injunction Hearing 12/14/23

1 the February 1st date in their brief, other than that
2 applications must be completed by January 31st and
3 congressional sources typically get their nominations in by the
4 end of that month.

5 And while it's true that most offers of appointment are
6 tendered between the middle of January and the beginning of
7 April, that's explained in Dean Latta's declaration at
8 Paragraph 61, nothing prevents the Naval Academy from extending
9 offers before then, which it already has done, as plaintiffs
10 have acknowledged.

11 As Dean Latta explained again in Paragraph 64, LOAs are
12 often provided at the beginning of an admission cycle in
13 September and, in fact, that's exactly what has happened. So
14 as of November 27th, shortly before we submitted the
15 declaration, the Naval Academy has extended 174 Letters of
16 Assurance. It's also extended 27 Offers of Appointment, and
17 again, as of the end of November, 15 candidates have already
18 accepted offers.

19 I wanted to be clear about that factual background because
20 it matters with respect to the comparison with Harvard. In
21 Harvard, race was a dispositive factor and it was a dispositive
22 factor at least twice. One, at the very beginning of the
23 process, points were explicitly added based solely upon race.
24 The Whole Person Multiple, which is the main driver of
25 admissions at the Naval Academy, does not consider race, hard

Preliminary Injunction Hearing 12/14/23

1 stop.

2 Second, at the end of Harvard's admissions process, it
3 engaged in what I understand is called the LOP, in which it
4 considers four factors and four factors only, and one of those
5 factors is race. And therefore the Supreme Court concluded
6 that race by definition had to be a determinative factor for at
7 least some, if not many applicants because race was a mandatory
8 feature of their admissions process.

9 As I just went through, that is quite different than the
10 policy here. And those three differences, the fact that we are
11 dealing with a military institution with a different compelling
12 interest, with military deference, and a very different policy
13 than what was at issue at Harvard makes all the difference on
14 the merits and shows the plaintiffs are not likely to succeed
15 at a minimum in the context of a mandatory preliminary
16 injunction.

17 I don't think I need to get too far into deference, Your
18 Honor. I think you may understand our views on that.

19 THE COURT: Well, I don't know that we need to get
20 too deep into it today. Much of it I think revolves around, I
21 think it's the Goldman versus Weinberger case, if I'm not
22 mistaken, in 1986 by the Supreme Court with respect to
23 deference to professional judgment of military authorities as
24 to the relevant importance of a particular military interest.

25 MR. GARDNER: That's exactly right. And Your Honor

Preliminary Injunction Hearing 12/14/23

1 recently recognized that --

2 THE COURT: Again, Mr. Gardner, just in terms of for
3 future reference, it's going to depend upon the consistency of
4 that. It doesn't apply when you're dealing with young men and
5 young women trying to become midshipmen at the Naval Academy,
6 but it sort of wanes as people go up the chain of command in
7 terms of command positions. That's something that's going to
8 be an interesting issue to address during discovery in this
9 case because the matter of military deference, judicial
10 deference to the military is not unlimited and I'm going to
11 look -- I'm going to be very interested to see what percentages
12 apply as those go up the rank in terms of years of service,
13 command positions.

14 As I've already mentioned a few times, I'm very curious as
15 to the matter of flag rank officers and those that are really
16 in the pipeline for major command positions, if the same focus
17 is focused there as it is apparently at some point with respect
18 to the admission to the Naval Academy.

19 MR. GARDNER: Understood, Your Honor. And you know,
20 to be clear, we are not asking for judicial abdication, and I
21 think that is really the main source of dispute between the
22 parties, where plaintiff's view seems to be because strict
23 scrutiny applies, therefore judicial deference doesn't. And
24 our view is, no, strict scrutiny does apply, as does judicial
25 deference. Those two principles are not mutually inconsistent

Preliminary Injunction Hearing 12/14/23

1 as Goldman shows, as Rostker shows, as Your Honor recently
2 recognized in the PI context in Hrdlicka versus Del Toro where
3 that was a challenge to a decision, as Your Honor knows, to
4 boot someone out of the -- not the training academy, the -- I'm
5 sorry. What do we call it? I'm sorry, Your Honor. Sorry, the
6 NAPS program.

7 THE COURT: Yes.

8 MR. GARDNER: Thank you. And there, and I'll just
9 remind the Court --

10 THE COURT: NAPS program, for the public, is the
11 Naval Academy Preparatory School.

12 MR. GARDNER: That's right.

13 THE COURT: In terms of people who spend a year doing
14 that before being admitted into the Academy.

15 MR. GARDNER: And I apologize in advance, Your Honor,
16 because I also speak in shorthand sometimes. But what the
17 Court said there and which we absolutely agree with is courts
18 are traditionally reluctant to interfere with the military's
19 establishment, including military personnel decisions. And it
20 further explained that courts are not equipped to review
21 professional military judgments and that courts afford the
22 Executive utmost deference in the areas of national defense and
23 military affairs. And that is simply all we are asking for
24 here, Your Honor, is that deference to the military judgments
25 in the eight declarations that we have submitted.

Preliminary Injunction Hearing 12/14/23

1 THE COURT: well, the deference, I don't know that
2 you need to rely upon deference here with respect to a motion
3 for preliminary injunction, but there are limits to that as
4 this case unfolds. we'll have to see how the case unfolds,
5 Mr. Gardner, quite frankly.

6 MR. GARDNER: I fully understand that. And again, I
7 think we're on the same page here as we are talking about a
8 preliminary injunction, and a mandatory preliminary injunction
9 at that, that seeks to change the status quo.

10 Now, plaintiff is asking, and I heard a lot of this when
11 my colleague was up on the podium, to scrutinize the rationales
12 the military uses. And again, we think that is inappropriate
13 in the context of judicial deference but I am happy to walk the
14 Court through and explain how each and every one of the
15 Government's important objectives lead to a national security
16 judgment.

17 THE COURT: I understand what the briefings have
18 been. I don't think that Mr. Norris overstated that. I think
19 that was just his focus in terms of bringing it into question.
20 Clearly strict scrutiny applies here, and it's a much higher
21 level of scrutiny than intermediate scrutiny.

22 MR. GARDNER: Absolutely. I guess what I'm getting
23 at, Your Honor, is I understood plaintiff to be arguing that
24 our objectives are not measurable, and we think they are. And
25 I can just very quickly explain.

Preliminary Injunction Hearing 12/14/23

1 with respect to unit cohesion, this Court could look at
2 Dr. Lyall's declaration and analysis which measures cohesion
3 and explains how less diverse groups are less cohesive and
4 therefore less effective.

5 Your Honor could look at Dr. Haynie's declaration from the
6 Department of Defense which describes the substantial body of
7 research supporting the conclusion of racial diversity enhances
8 cohesion and lethality. And this includes, among other things,
9 the Rand report that she refers to in her declaration which
10 specifically included the military and law enforcement. That's
11 in Paragraph 11 of her declaration.

12 You could also look at the Navy's Office of People
13 Analytics study. That's Exhibit N to our submission. And that
14 determined that unhealthy diversity climates were associated
15 with negative readiness outcomes.

16 This Court can also look at the fact that no race riots
17 have occurred since the Navy has started to consider race in
18 its admissions process. And why is that? Because this is just
19 as measurable as in the prison violence context where success
20 is measured by the prevention of harm. And you might recall,
21 Your Honor, in the Harvard case itself, it favorably cited to
22 that context as one in which the consideration of race is
23 appropriate and ostensibly appropriately measurable.

24 And you can also look at in terms of unit cohesion things
25 like feedback from current service members through surveys,

Preliminary Injunction Hearing 12/14/23

1 focus groups, and town halls. I heard my colleague say, if a
2 survey doesn't ask how do you feel about Affirmative Action,
3 how useful can it be? I think my colleague misunderstands the
4 purpose of these surveys. The purpose of these surveys is to
5 get an understanding of how they feel in racially diverse or
6 less racially diverse environments and whether the lack of
7 diversity is causing concerns with morale and cohesion. That
8 is an entirely appropriate way to measure cohesiveness in a
9 unit and plaintiffs have provided no evidence to contradict
10 that.

11 And with respect to recruitment and retention, again, Your
12 Honor can look at the studies such as the Navy's OPA study
13 which looked at the return on investment on diversity in
14 retention and mission readiness.

15 It can also be showed by -- it can also be measured by
16 showing an increase in the diversity of the Officer Corps over
17 time. For example, with the Navy, the number of diverse
18 officers increased from 19.1 percent in 2010 to 24.5 percent
19 today. And at the Naval Academy, the number of diverse
20 midshipmen has increased from 24 percent in 2002 to over 40
21 percent in the class of 2026. So we know that it is having an
22 impact.

23 Now, plaintiff is relying upon the Supreme Court's
24 decision in Wygant and claims that recruitment and retention
25 may not be compelling interests supporting classifications

Preliminary Injunction Hearing 12/14/23

1 based on race. Respectfully, Your Honor, Wygant has no
2 application here. In Wygant, the Court characterized the
3 interest as providing minority role models for its minority
4 students in an attempt to alleviate the effects of societal
5 discrimination. It then concluded that "societal
6 discrimination alone is not sufficient to justify a racial
7 classification." Here, the military's interest in retention
8 and recruitment is to further its compelling national security
9 interest. Therefore, Wygant simply has no application.

10 And with respect to legitimacy, both here and abroad, it
11 can review the declaration of Dr. Haynie, who explains, based
12 on research, the important role military diversity plays in
13 domestic and international legitimacy. That's in Paragraphs 13
14 through 15 of her declaration.

15 In short, Your Honor, plaintiff's invitation to measure
16 the military's national security interest lacks precedent and
17 is wrong. But if the Court were inclined to go down that path,
18 they have failed to meet their burden to show these are not
19 measurable interests.

20 I want to -- I want to respect the Court's time and move
21 ahead. I do want to address a few issues about narrow
22 tailoring, if I may.

23 First of all, the Naval Academy's consideration of race
24 does not treat race as a negative or engage in racial
25 stereotypes. It does not intend to consider race indefinitely,

Preliminary Injunction Hearing 12/14/23

1 and despite its good-faith consideration of alternatives to
2 race, none are currently feasible.

3 Let me take on using race as a negative first. In
4 Harvard, the Court said race was used as a negative when it
5 was, quote, determinative. So, for example, in Harvard, at the
6 end of the admissions process as I mentioned, only four pieces
7 of information was considered, one of which was the applicant's
8 race. In that circumstance, race was a determinative tip for a
9 significant percentage of all admitted Black and Hispanic
10 applicants.

11 Conversely, in Grutter, the Court held that race was not a
12 negative where the school considered all pertinent elements of
13 diversity and nondiverse candidates could be and were selected
14 over minority applicants.

15 Dean Latta expressly explains in his declaration in
16 Paragraph 70 that in the limited circumstances where race is
17 considered as part of a wholistic assessment, it is not
18 determinative. And plaintiff doesn't dispute that in each of
19 the four circumstances where the Naval Academy's admission
20 process can consider race, white applicants are also selected
21 for admission.

22 Now, plaintiff simply ignores these facts and instead
23 seems to argue that any consideration of race in the admissions
24 process is inherently treating race as a stereotype. This is a
25 misreading of Harvard. Harvard did not hold that any

Preliminary Injunction Hearing 12/14/23

1 consideration of race in admissions, no matter how contextual
2 or how nondeterminative, is inherently negative.

3 of course, if the Court had meant that in Harvard, there
4 would have been no need to have assessed the compelling
5 interest in that case or the other narrow tailoring issues in
6 that case or to even carve out the service academies from its
7 decision because if the consideration of race was always a
8 negative, it would have made that conclusion, full stop. It
9 did not.

10 with respect to stereotyping, if I can very quickly, I
11 know we're going long, Your Honor.

12 THE COURT: That's all right. Take your time.

13 MR. GARDNER: In Harvard, what the Court found to be
14 an impermissible stereotype was that the admissions policy
15 invited or risked assumption that people of a particular racial
16 group have a particular racial viewpoint or opinion on some
17 issue such that it would enhance the richness of classroom
18 discussion. But again, as Dean Latta explains clearly in his
19 declaration in Paragraph 79, and they do not contradict this
20 with any evidence.

21 The Naval Academy does not seek to admit diverse
22 candidates on the assumption that they express a particular
23 viewpoint shared by others of the same background. Rather,
24 what the Naval Academy seeks to do is to admit diverse
25 candidates so that midshipmen can learn how to be effective

Preliminary Injunction Hearing 12/14/23

1 battlefield commanders and so the Navy and the Marine Corps can
2 achieve its ultimate national security interest.

3 Now, plaintiff nevertheless contends that the Naval
4 Academy is engaged in stereotyping because it has concluded
5 that a racially diverse Officer Corps will foster trust and
6 confidence between the Enlisted Corps and its members.

7 Your Honor, that is not based on a stereotype or
8 assumptions, but rather data, history, and real-world combat
9 experience indicating that racial diversity enhances military
10 readiness, recruitment, retention, and legitimacy.

11 As I've already mentioned, Your Honor, the research by
12 Dr. Lyall reflects racially diverse units are more cohesive.
13 And that is supported again by the Navy's OPA study, which is
14 Exhibit N, and the extensive history of troublesome race
15 relations in the military as explained in detail by Dr. Bailey,
16 and Dr. Sherwood highlight that point. Again, plaintiffs do
17 not dispute any of that history in response to our experts.

18 Plaintiffs also argue that the racial categories
19 considered by the Naval Academy are too imprecise to satisfy
20 strict scrutiny, again relying upon the Harvard Court's
21 rejection of similar categories. But here again, as Grutter
22 commands, context is critical.

23 Here, the Naval Academy relies upon the same OMB racial
24 and ethnic categories used throughout the Government, including
25 the Census Bureau, and it's using it for an entirely different

Preliminary Injunction Hearing 12/14/23

1 purpose than was used in Harvard. That purpose is to further
2 its important national security interest.

3 Now, remember, Your Honor, given that the Naval Academy's
4 goal is for the incoming class to have rough parity with the
5 demographics of the general population and the general
6 population data is reported by the Census Bureau using those
7 same OMB categories, it is entirely reasonable and appropriate
8 for the Naval Academy to use those same classifications in
9 citing its goals.

10 And while the Court in Harvard was clearly concerned that
11 the racial categories were undefined, that's not the issue here
12 because OMB does define the various racial and ethnic
13 categories. Simply put, Your Honor, context matters, and here
14 there is no mismatch between the military's goals and the means
15 by which it is seeking to achieve those goals.

16 I want to address endpoint, Your Honor, because I know
17 that's a concern for you and I want to make sure I'm addressing
18 your concerns and that I answer any questions.

19 With respect to an end point, plaintiff's contention that
20 Harvard mandates a defined end point once again wholly ignores
21 the distinct military interest at issue here, which is more
22 analogous to the penological interests in the prison case
23 Johnson than the interest in educational diversity at Harvard.

24 THE COURT: Johnson is not a military case; it's a
25 prison case.

Preliminary Injunction Hearing 12/14/23

1 MR. GARDNER: Correct, Your Honor, but it's also
2 dealing with the issue of harms in the prison context and
3 trying to prospectively address those harms. That is much more
4 analogous than the interest of educational diversity for the
5 sake of classrooms which was at issue at Harvard.

6 THE COURT: Just as we're winding up here,
7 Mr. Gardner, but does the language in Chief Justice Roberts'
8 opinion in the Harvard decision with respect to holding, among
9 other holdings -- the sixth of the six holdings was that the
10 admission programs at Harvard failed strict scrutiny by lacking
11 a logical end point. What is the logical end point with
12 respect to these numbers in the military is not one that's
13 continually changing?

14 MR. GARDNER: I do -- I want to answer that question
15 and I absolutely will, but I want to just for clarification
16 point you to Page 213 of Chief Justice Roberts' opinion where
17 he explained that the end date discussed in Grutter was based
18 on the expectation that -- I'm going to quote now -- "the use
19 of racial preferences will no longer be necessary to further
20 the interest approved today." That interest, again, is quite
21 different than the military's interest in national security.

22 So I wanted to be very clear about that, that the Harvard
23 decision does not address the very different interests we're
24 dealing with here.

25 And remember, Your Honor, in the Johnson case that the

Preliminary Injunction Hearing 12/14/23

1 Court in Harvard cited to approvingly, the Court never
2 suggested that prison officials had to identify a time at which
3 it would no longer consider race to prevent racial violence in
4 prisons, and with good reason, because such danger is going to
5 be ever present. The same is true with maintaining a lethal
6 fighting force.

7 But I do want to emphasize, because I know you have this
8 question, what is relevant is that the Naval Academy annually
9 reviews its admissions processes, including the use of race,
10 and over the years has adjusted that process accordingly to
11 ensure that its consideration of race remains narrowly
12 tailored, and the Fifth Amendment requires nothing more.

13 What we know from Dean Latta is as the numbers of racially
14 diverse applicants -- or admitted applicants, I should say, has
15 increased, the consideration of race has decreased, and that's
16 what I think is fundamentally at issue here.

17 I do want to briefly talk about race-neutral alternatives,
18 and I want to talk about it because I didn't hear my colleague
19 talk about that at all. We explained in Dean Latta's
20 declaration, and this is unchallenged, that the Naval Academy
21 has considered at least seven race-neutral alternatives, yet
22 none have been successful. That's in Dean Latta's declaration,
23 Paragraphs 91 through 99.

24 Plaintiff does not seriously challenge any of this or even
25 suggest other race-neutral options that the Naval Academy

Preliminary Injunction Hearing 12/14/23

1 somehow should have considered to allow it to accomplish its
2 national security mission. Instead, it makes the argument that
3 the Merchant Marines do not consider race in its "general
4 admissions process."

5 I want to be very clear with Your Honor. What they are
6 relying upon is the Solicitor General's brief in Grutter, Page
7 17, Note 3. And I'd like to read that to Your Honor, because
8 it's entirely inconsistent with plaintiff's arguments.

9 The Merchant Marine does consider race for the seats it
10 fills through the appointments process. That is exactly what
11 the Naval Academy is doing as well, so there is no daylight
12 between what the Merchant Marines are doing, what the Coast
13 Guard is doing, and what the Naval Academy is doing.

14 I would note, however, that neither the Merchant Marines
15 nor the Coast Guard are under the direct supervision of the
16 Department of Defense. Rather, the Coast Guard is under the
17 Department of Homeland Security and the Merchant Marines are
18 under -- I'm sorry, I do not remember right now but it's not
19 the Department of Defense.

20 Plaintiff's only other argument on this point is that the
21 Naval Academy has to study what the world would look like if it
22 abandoned the consideration of race. But of course, Your
23 Honor, it has done that as reflected by the research of
24 Professor Lyall, the Department of the Navy's OPA study, and
25 the expert judgment of the military's leaders based on history

Preliminary Injunction Hearing 12/14/23

1 and real-world combat experience. Plaintiff has simply failed
2 to rebut these conclusions.

3 For these reasons, Your Honor, we strongly believe that
4 the Court should deny the plaintiff's motion for a preliminary
5 injunction.

6 THE COURT: Thank you very much, Mr. Gardner.

7 Mr. Norris, I'll be glad to hear from you on this in
8 rebuttal and we'll wind it up.

9 MR. NORRIS: Thank you, Your Honor. I'll be brief.
10 Just a couple of points.

11 THE COURT: Take your time.

12 MR. NORRIS: The first is, I still believe and I
13 don't think I've heard rebutted there are some clear violations
14 of Harvard if you assume Harvard applies to the Naval Academy.
15 There is no end point that's any more definitive than the one
16 that was offered by Harvard and UNC. They still admittedly use
17 the categories to sort people for military interest that the
18 Supreme Court has called utterly arbitrary, and of course they
19 use race as a negative because they use it as a positive in a
20 zero-sum system.

21 Now, I think the gist of the argument is that, well,
22 Harvard does not apply to us in the same way, and I think the
23 only way you get there is if you think that something other
24 than strict scrutiny applies to the Naval Academy's use of
25 race, which they've conceded is not true, or that when applying

Preliminary Injunction Hearing 12/14/23

1 strict scrutiny that deference plays such a large role that it
2 could change, it could alter those rules from Harvard so that
3 they no longer apply to the military, which I think is my
4 friend's argument.

5 There is zero cases that they've cited where that has been
6 the case, where the military has gotten deference when it uses
7 race to classify citizens. They've cited Goldman I think the
8 most in the argument. Goldman is a case about religion, not
9 race. They have no race cases. Johnson versus California says
10 race is unique. It's the one where you're not going to get
11 deference. And in fact, the fact that we're talking about
12 Government power here at its apex is all the more reason not to
13 give deference is the holding of Johnson.

14 More importantly, we've talked a lot about Footnote 4 of
15 Harvard. Footnote 3 of Harvard addresses giving deference to
16 the military on questions of race. It talks about Korematsu
17 and says one of the gravest mistakes in the Supreme Court's
18 history is giving deference to the military when it racially
19 classified citizens. It says --

20 THE COURT: The Korematsu case, is that what you're
21 talking about?

22 MR. NORRIS: Yes.

23 THE COURT: The Japanese internment case.

24 MR. NORRIS: Absolutely. And they say that is why,
25 and they say this in Footnote -- I believe there's other

Preliminary Injunction Hearing 12/14/23

1 footnotes from the Chief Justice's opinion that say history
2 shows the folly of deferring to the Government when it uses
3 race. And Korematsu, which is the military, is actually the
4 first time the Court ever articulated strict scrutiny is the
5 example given.

6 And if you had any doubts about this, there's important
7 context -- and I believe this is part of the dissent in the
8 Harvard case, but there's important context about what happened
9 in that case. The Government's argument in Harvard was not so
10 much about the military academies. They said we get most of
11 our officers from ROTC, so if you stop civilian universities
12 from using race, that will directly affect the racial diversity
13 of the Officer Corps of all branches of the military. You
14 should defer to us on that national security interest and keep
15 letting civilian universities use race.

16 The Supreme Court did not entertain that argument at all
17 and now all civilian universities are barred from using race in
18 admissions. For every one officer that the Academy sends, ROTC
19 sends three. The exact same interest did not sway the Court in
20 Harvard. And this is all about narrow tailoring is really
21 where I think this case is ultimately going to be decided, and
22 narrow tailoring --

23 THE COURT: What were the facts in the Harvard case
24 with respect to their ROTC program?

25 MR. NORRIS: There's not a lot of facts. The

Preliminary Injunction Hearing 12/14/23

1 Government's brief said that we get most of our officers from
2 ROTC so therefore you should let --

3 THE COURT: What is the status of the ROTC program at
4 Harvard?

5 MR. NORRIS: I mean, Harvard is now race-neutral for
6 the first time this cycle.

7 THE COURT: There still is Naval ROTC at Harvard?

8 MR. NORRIS: There is. I think it recently came
9 back. It was gone for a long time.

10 THE COURT: It was gone for a considerable period of
11 time.

12 MR. NORRIS: Yeah. But it came back I think five or
13 six years ago, so it's back. It is a totally race-neutral
14 process. It's sending officers to the military triply as much
15 as the academies.

16 But I'm not sure what role deference is really supposed to
17 play even under the Grutter regime, which is no longer good
18 law. The Fisher case said you get deference on articulating
19 your interests, you get deference on whether those interests
20 are important. You never get deference on whether those
21 interests whether your use of race is narrowly tailored to
22 achieving those interests. So I don't think deference is going
23 to get them that far even if you afford it to them.

24 The second point is, my friend spent a lot of his time
25 saying that they only use race a little bit in their process.

Preliminary Injunction Hearing 12/14/23

1 I don't think that's true factually. But even if you do only
2 use it a little bit, that still triggers strict scrutiny.
3 That's long been the law, including starting with the Fisher
4 cases. Harvard itself says -- UNC said that it only used
5 race -- that race only affected 1.2 percent of the admissions
6 decisions for in-state students. The Chief Justice cited that
7 figure and said, that's still too much. Any amount of racial
8 discrimination is too much. It triggers strict scrutiny.
9 Eliminating racial discrimination means eliminating all of it.
10 There's no de minimus exception to that rule.

11 Harvard did not use points, race-based points. I don't
12 know where that's coming from. If you read the Solicitor
13 General's brief, it will tell you in Harvard that Harvard was
14 not using a point system. That would have been grossly illegal
15 under Gratz. That's not what they were doing. They were using
16 race similarly to the way the Academy now has revealed it uses
17 race. If you read the Solicitor General's brief, it says, we
18 use race just like Harvard and UNC in the Academy. So there is
19 a real factual distinction to be made.

20 But if race doesn't really matter, if it's not
21 determinative for any person getting into the Naval Academy,
22 then why are they using it? If it serves no purpose, they
23 can't possibly meet strict scrutiny. If your numbers would be
24 the same if you took away race, the Parents Involved says that
25 means you fail strict scrutiny. It's not a reason to let you

Preliminary Injunction Hearing 12/14/23

1 off the hook.

2 THE COURT: Just so the record's clear, Mr. Norris,
3 that point is well taken but I think really the reality is what
4 is going to be explored in this case is the extent of racial
5 diversity throughout the military and the Navy particularly and
6 what is the rate of diversity with respect to enlisted
7 personnel and how does that relate to what its rate of
8 diversity is and the Officer Corps.

9 And strict scrutiny of this Court is going to have to be
10 focused upon that because the briefing has already indicated
11 that there's no question, as I've earlier noted when I maybe
12 got a little too hard on you in questioning, that there had
13 been racial tensions in the military. There have always been
14 racial tensions in the military for a long time. And they've
15 lessened but they are still there and it's understandable from
16 the point of view of minorities when you have -- there was a
17 time when minorities could only work as chefs and cooks and
18 what have you, and obviously President Truman in 1948
19 desegregated the military and it still didn't solve all the
20 problems.

21 And that is where the strict scrutiny analysis is going to
22 have to go and it may rise or fall on that in terms of if
23 you're really going to make this effort then you got to be
24 consistent all the way through, and that's what the dynamics
25 are with respect to -- it's easy to have opinions offered by

Preliminary Injunction Hearing 12/14/23

1 experts in terms of cohesiveness in battle situations, but the
2 proof in the pudding is going to be what do the numbers
3 indicate in terms of whether there's actually been that
4 diversity that has achieved the result and if there is not, if
5 the numbers don't indicate it, then it increasingly becomes
6 difficult to justify.

7 The flip is is that it may show that there has been
8 cohesiveness. It may show greater diversity as you go up the
9 chain. I don't know, but I do think that, just so you all know
10 where I'm coming from, Harvard is not an absolute cookie cutter
11 and just fits here. All this language is very important and
12 Chief Justice Roberts' view has been long known for a long
13 time. I think one of his great quotes was you deal with racial
14 discrimination by not discriminating on the basis of race, I
15 think is one of his great quotes one time in an earlier case.

16 well, it doesn't totally apply and perfect fitting with
17 the military but there's got to be a record here and we're
18 going to have to explore that in terms of what the record bears
19 in that regard to see whether or not we're not going to be able
20 to opine as to success or failure but it certainly is going to
21 be a factor in strict scrutiny, and so your point is well taken
22 on the strict scrutiny point. It is going to require that.

23 MR. NORRIS: Absolutely. I understood all that, Your
24 Honor. I think that takes me to my last point exactly, which
25 is there's a concern that maybe you don't have enough

Preliminary Injunction Hearing 12/14/23

1 information now to rule on this motion, but the nature of
2 preliminary injunctions are that you have to make a prediction
3 based on what you do know now given the likelihood of
4 irreparable harm that's coming down the pike in February once
5 the application window closes, and I would just suggest that
6 there is enough evidence in the record.

7 My friends have submitted 650 pages of exhibits defending
8 what they do. My friends say at Page 21 of their brief that
9 this Court has a, quote, extensive evidentiary record before
10 it. And we've been really careful in this case. We think all
11 of the arguments -- I totally understand where Your Honor is
12 coming from. I think there are plenty of ways for them to lose
13 once the factual records gets developed further, but we've
14 focused this motion on our legal arguments.

15 whether you use race as a negative is conceded factually
16 in a legal determination. whether they use arbitrary
17 categories is conceded factually. It's a legal question. Same
18 thing with an end point and there's other parts of Harvard that
19 are purely legal. We think they can be decided now and they
20 need to be decided now so that another wave or two of high
21 schoolers and young college students are not discriminated
22 against while this case proceeds.

23 And you know, I think I heard Your Honor say that you plan
24 to rule today. Even if --

25 THE COURT: I'm going the rule from the bench today

Preliminary Injunction Hearing 12/14/23

1 and I'm going to follow up with an opinion in the next week.

2 MR. NORRIS: That's excellent, Your Honor. We
3 appreciate it because whoever loses this case has to move
4 quickly likely to two more courts. We really appreciate that.

5 THE COURT: Sure.

6 MR. NORRIS: I would just say, and I hope it's not
7 the case, if it's our side that loses today, I also just want
8 to move from the podium for -- I'd like to move for an
9 injunction pending appeal giving us the same relief, so
10 stopping the Naval Academy from using race as a factor.

11 THE COURT: Well, I'll deal with that, Mr. Norris.
12 The reality is this: If your interest is truly to move this
13 case and to move it, then I think you have to recognize -- I
14 know appellate courts take -- some district judges take
15 exception to the latitude that Circuit Court judges take on
16 some finding factual matters, but I will say that -- you may or
17 may not be aware of this, but in the last two years I took
18 Senior Status. I sat with the Ninth Circuit about nine times,
19 so I really kind of look at it from the Circuit Court point of
20 view and I still sit here on the bench here in Baltimore,
21 Maryland.

22 There are facts here. There are facts that have to be
23 evaluated. There has to be a record developed. Harvard had a
24 bench trial. University of North Carolina had a bench trial.
25 There was a full record upon which the Court could deal. And

Preliminary Injunction Hearing 12/14/23

1 the notion that we get lost in the weeds here and try to run to
2 Richmond for Richmond to evaluate it and eight months from now
3 say we've got to remand it back for factual findings, I don't
4 think it's in the interest of the parties here. That's my own
5 view.

6 You can do what you want to do, but it's clear to me that
7 there are factual issues that need to be resolved as quickly as
8 possible and studies need to be made. There are questions I've
9 asked in this hearing that clearly are factual questions. With
10 all due respect to the United States Court of Appeals for the
11 Fourth Circuit, they are not in the fact finding business or
12 reviewing records like that.

13 So I would just urge that I'm more than willing to get
14 this case moving on a track, but I can't control what the legal
15 analysis is if you all decide if you really want to move the
16 case or you just want to see how long it takes. I certainly
17 don't think this case should take five or six years to resolve.

18 And just having at least nine times in the last years worn
19 the Circuit Court hat, I've seen it helps if the District Court
20 can develop the record and both sides have argued certain
21 inferences or facts. And some facts, really, they are going to
22 sit. There's some things I've already said several times I'd
23 like to know of the 40 percent of officers who get flag rank
24 because they are from the Naval Academy how many, if any, are
25 African American or of a minority, and all the Chiefs of Naval

Preliminary Injunction Hearing 12/14/23

1 operations, and then to say, well, we're in the process of
2 solving that problem, well, that may or may not be the case.

3 For example, we haven't even begun to deal with the fact
4 that I noted in terms of congressional nominations on Page 66
5 of the defendant's brief -- actually it's an ECF listing, that
6 it's noted by the defendant's brief, the Government's brief
7 from the Academy. As it stands, congressional nominations are
8 disproportionally provided to more white students than
9 minorities.

10 well, that's a factor I looked at and I said I really want
11 to find out why that is and what is done vis-à-vis the matter
12 of congressional nominations and how all this blends together.
13 There are just lots of facts that require the building of a
14 record.

15 And I would just note that's my view of it and it doesn't
16 preclude you trying to then get in the line for five months of
17 waiting to have argument in front of the Fourth Circuit. All
18 this is not just on legal argument, trying to have someone say
19 Harvard is this or Harvard fits in perfectly, ergo. I don't
20 think that's what can be taken from a footnote in Chief Justice
21 Roberts' opinion. I think it guides us, without question, but
22 we have to look at it in terms of whether or not there are any
23 distinct issues as to the military. And there may or may not
24 be, but that's really a factual finding. That's not a legal
25 analysis in terms of conducting strict scrutiny in terms of

Preliminary Injunction Hearing 12/14/23

1 building a record. That's the only comment I make in response
2 to you, and it seems to me that's what we ought to do.

3 MR. NORRIS: I understand, Your Honor. As I stand
4 here today, I can't, you know, let a cycle go by where my
5 client, the members of our organization are discriminated
6 against.

7 THE COURT: I understand. Sure.

8 MR. NORRIS: I think the answer as I stand here today
9 is both. We should try to go up on the legal issues while we
10 try to accelerate the trial and get the factual issues totally
11 figured out.

12 THE COURT: we'll see. we'll see.

13 MR. NORRIS: But that's why, you know, we've had
14 conversations with the Government. I think we tried, both
15 sides tried in earnest to negotiate a fast trial schedule. We
16 weren't able to do it.

17 THE COURT: I'm going to address that right now, as a
18 matter of fact.

19 MR. NORRIS: Okay. I did want to just for house --
20 just to preserve my ability to go up quickly, we would like to
21 move for an injunction pending appeal in the event that our
22 motion is denied.

23 THE COURT: I'm not going to grant that.

24 MR. NORRIS: I assumed so. Thank you.

25 THE COURT: I'm sorry, no disrespect to the Fourth

Preliminary Injunction Hearing 12/14/23

1 Circuit, you can brief that if you want. It's not in your
2 clients' interest. You're talking about the need for your
3 clients to get decisions and now you make a 180-degree turn
4 that will clearly drag this on for another six to eight months.
5 So all the arguments you made as to your clients needing to
6 have a decision by the end of February and suddenly you make a
7 complete 180-degree turn. It is absolutely not in your
8 clients' interest to have that be the case and wait six, eight
9 months for the Fourth Circuit to deal with it, then maybe come
10 back to this Court, and it's certainly not in the interest of
11 the Naval Academy.

12 So I have no intentions of granting an interlocutory
13 appeal on my denial of an injunction here. And if the Fourth
14 Circuit wants to determine that there's no legitimate issue of
15 fact here and that the criteria with respect to preliminary
16 injunction are that you are likely to succeed on the merits,
17 that certainly sounds like a factual finding to me.

18 But having said that, you know that I was reversed
19 eight-seven by the Fourth Circuit in the City Struggle case
20 over the flier and it was subject to some pretty strenuous
21 dissents by 7 of the 15 members of the Fourth Circuit because I
22 was reversed because I did not grant a preliminary injunction.

23 So who knows, but it certainly doesn't speed the process
24 for your client so I'm not just going to grant injunctive
25 relief at this point in time or enjoin it until you go to

Preliminary Injunction Hearing 12/14/23

1 Richmond and I don't -- you can do what you want to do on that
2 in terms of we'll have to research it and whether or not you
3 think you have the right to have an interlocutory appeal on it.
4 You can take that route if you want, but we're prepared to do
5 the work here. We've gone almost two hours now in this matter
6 and we're prepared to do the work.

7 And just with all due respect to my colleagues down in
8 Richmond on the Fourth Circuit, there are factual matters to be
9 addressed here and this is the Court that's equipped to do
10 that, to weigh those affidavits, to look at the facts, ask the
11 questions, develop the factual record. And I think that is
12 something we're prepared to do, and then whichever side
13 prevails, clearly there will be appeal to the Fourth Circuit, I
14 understand that, and it may or may not go to the Supreme Court.
15 But it develops a factual record and I think it's important to
16 develop a factual record here is my only thought.

17 MR. NORRIS: And Your Honor, we haven't decided what
18 strategy we're going to pursue.

19 THE COURT: I understand. You do the best you can
20 and you can file it and I'm just telling you flat out now what
21 my view of it is. And indecisiveness is not one of my
22 problems, Mr. Norris, as you may have already realized by now.
23 And, you know, to talk about how crucial it is to have a
24 decision for your clients and then to take the very interesting
25 legal step to take seven or eight months to go to the Fourth

Preliminary Injunction Hearing 12/14/23

1 Circuit certainly does believe some interest in trying to get
2 relief for your clients.

3 MR. NORRIS: Your Honor, respectfully, that assumes
4 the case here would be stayed while we took the preliminary
5 injunction up on appeal, which is not necessarily the case.

6 THE COURT: That's exactly -- it's dead in the water.

7 MR. NORRIS: I'm sorry?

8 THE COURT: If the Fourth Circuit grants a relief on
9 appeal with respect to the injunctive relief here, this case
10 will stop dead in the water, not one minute of discovery,
11 nothing. Because I'm a very busy judge here. I'm not going to
12 spend time on this case if you're going to go to Richmond and,
13 if that's the case, if the Fourth Circuit feels like they can
14 do it, fine. The case will stop dead in the water and it will
15 be a stay. Nothing will happen.

16 MR. NORRIS: Thank you, Your Honor. Now that we know
17 that, that will affect our decision.

18 THE COURT: I'm telling you flat out, and you can
19 take that to the Fourth Circuit as well. We're pretty busy
20 here. And so the notion of going through this while you appeal
21 that, that's perfectly fine. If you want to do that, let me
22 know right away. It will save a lot of time for these law
23 clerks who have been working hard on this. But I have no
24 intentions of granting that and the Fourth Circuit can educate
25 me on what factual findings it thinks it makes. I suspect that

Preliminary Injunction Hearing 12/14/23

1 the Fourth Circuit would say there's a record that has to be
2 developed.

3 You've cited Harvard a great deal, Mr. Norris. You are
4 ignoring the fact Harvard was a bench trial and was, what, 15
5 days of a bench trial. North Carolina was, what, nine or ten
6 days of a bench trial. North Carolina, last time I checked, is
7 in the Fourth Circuit. I would think the Fourth Circuit might
8 take note of the fact it took a North Carolina judge, one of my
9 colleagues, nine days to conduct a bench trial.

10 So the notion that you go to Richmond and say, well,
11 Harvard applies, it's very easy a matter of law, I don't think
12 that has much merit. But I'll enter a scheduling order and
13 we'll go over that right now after I deny the motion for
14 preliminary injunction, which I'm obviously going to do.

15 And I'm going to give you a trial date. I'm going to set
16 a trial date here, set a scheduling order, and I'll enter that
17 tomorrow and I do not -- I'm not going to grant any injunction
18 in any way, shape, or form pending a stay for an appeal to the
19 Fourth Circuit. You're free to do that, and the Fourth Circuit
20 is certainly free to overrule me on that and grant that. If
21 that's the case, that's perfectly fine. This case will stop
22 dead in the water. There won't be one deposition. There won't
23 be one exchange of documents under the auspices of this Court.
24 This case will be listed as stayed and it will be stopped dead
25 in the water.

Preliminary Injunction Hearing 12/14/23

1 I see some Naval officers here. That is an apt analogy,
2 it will stop dead in the water. I see the officers are
3 laughing. Everybody will stand down. We will take the ship,
4 put it into the harbor, and you'll have to get recommissioned
5 to get the ship out of the harbor and that's where we'll stay.

6 MR. NORRIS: I appreciate the clarity, Your Honor.
7 That helps us.

8 THE COURT: I hope I made myself clear.

9 MR. NORRIS: Yes.

10 THE COURT: I suspect I did and I didn't mean to
11 raise my voice. If I did, I apologize. We're laughing here.

12 Let me just go over, first of all, a ruling here.

13 Anything further, Mr. Norris, on this?

14 MR. NORRIS: I don't think so, Your Honor. No.

15 THE COURT: Thank you all very much for the very
16 thorough briefing in this matter. It's been well argued and
17 ahead of time I warned you I have a hot bench, but I don't mean
18 anything by it. I want to ask questions to get answers and let
19 you know where we're going because this is important to the
20 litigants here, Members A and B, it's definitely important to
21 the Naval Academy, and we have to get some resolution, have
22 this thing moving.

23 A preliminary injunction, as I've already noted, is an
24 extraordinary remedy involving the exercise of very
25 far-reaching power to be granted only sparingly and it is in

Preliminary Injunction Hearing 12/14/23

1 limited circumstances. And the Fourth Circuit has noted that
2 in *MicroStrategy versus Motorola* in 2001, 245 F.3d 335, and it
3 cites its earlier opinion in *Direx Israel* at 952 F.2d 802. And
4 mandatory preliminary injunctions, those that either alter --
5 that alter rather than preserve the status quo are disfavored
6 as has been specifically noted by the Fourth Circuit in
7 *Mountain Valley Pipeline*, 915 F.3d 197, a Fourth Circuit
8 opinion in 2019.

9 And certainly *Students for Fair Admissions*, with respect
10 to this request here, would certainly alter the status quo, and
11 as far as my view is at that stage, at this stage in the
12 proceedings, it has not made a clear showing that it will
13 succeed in its claim that the Naval Academy's race-conscious
14 admissions practice violates the Fifth Amendment's Equal
15 Protection Principles at this stage in the proceeding.

16 Clearly, when the case proceeds with discovery, the
17 Academy has to proceed under a strict scrutiny analysis. But
18 it is imperative, in my view, that a factual record be
19 developed in this matter such that the Court can determine
20 whether the "potentially distinct interests that the military
21 may present," as noted by Chief Justice Roberts, "can survive
22 strict scrutiny." And my view is the best and most legitimate
23 way for the Judiciary to deal with this matter is to proceed as
24 I think it should with a scheduling order here and a trial date
25 and move forward on it so that. So that -- to deploy the

Preliminary Injunction Hearing 12/14/23

1 equitable powers of this Court in this case would I think be
2 counterproductive.

3 So with that, it will be denied for the reasons set forth
4 here on the record to be expounded upon by an opinion that
5 we'll do our best. Tomorrow is the courthouse party, you're
6 all welcome to come if you'd like, but really I can still
7 operate very well with that but my law clerks don't function as
8 well after the courthouse party. I'm teasing them over there.

9 So I'm not going to make them -- we're laughing here in
10 court -- I'm not going to make them stay late tomorrow but
11 we're going to do our best to get the opinion out middle of
12 next week because again, Mr. Norris, to the extent you all want
13 to seek a stay of these proceedings and appeal to the Fourth
14 Circuit, you're certainly entitled to that.

15 Under my ruling, I'm not going to note that an
16 interlocutory appeal will be granted and we're going to stay
17 these proceedings, but if the Fourth Circuit reverses me on
18 that, then fine. The stay will be issued and you prepare
19 briefs for the Fourth Circuit and this case will be frozen
20 probably until being remanded back here for factual findings
21 eight months from now, but that's, again, that's your choice.

22 I'm prepared to issue a scheduling order here that would
23 date back from the bench trial. If I issued a scheduling order
24 tomorrow here, there would be a December 28th deadline for
25 request for modifications. You don't have to report all these.

Preliminary Injunction Hearing 12/14/23

1 This is what would happen if I issued a scheduling order
2 tomorrow. Report about deposition hours, et cetera, et cetera,
3 Rule 26 disclosures by February 12, discovery deadline, April
4 29, 2024, requests for admissions in May, pretrial motions
5 deadline May 28th.

6 I'm certainly prepared to do that. I think the start of
7 it is normally these kinds of situations I think the start of
8 it is the bench trial. Now, I think that from what I've seen
9 of this and what I anticipate to be the factual necessity here
10 and, indeed, some of the things that I think need to be
11 developed in the factual record and then perhaps an explanation
12 or lack thereof, I would think that we probably should set
13 aside certainly ten days for a bench trial, two full weeks for
14 a bench trial. If it took longer in the Harvard matter but the
15 same in the North Carolina matter, I don't know.

16 What is your reaction on that, Mr. McCarthy? How long do
17 you think this will take, a bench trial will take place? And I
18 will tell you this. You will get right-away status. You will
19 not get bumped for a criminal trial. I've had a pretty steady
20 record for that in 20 years on the bench. When I set a civil
21 case it doesn't get bumped. There won't be any change. If I
22 drop dead, I'll make sure I've got another judge lined up
23 behind me, okay? So it's as simple as that. You will have a
24 trial date. I'm going to give it to you. And once we set it,
25 I tend not to want to postpone it. Some people accuse me of

Preliminary Injunction Hearing 12/14/23

1 having my own mini version of the Rocket Docket from the
2 Eastern District of Virginia over here, but I think it's
3 helpful to the parties and everyone to get a date.

4 Let me hear from you in terms of how long you think it
5 would take, and I'll set a trial date in sometime in the
6 summer. I tend to think the safest process might be a trial
7 date in September that we would set and that would give plenty
8 of time for discovery and what have you and also some delays in
9 the summer months, but I'm at your disposal on this,
10 Mr. McCarthy. Tell me how long you think the case would take
11 and tell me what trial date you would like and I'm more than
12 prepared to move that whole calendar up if you think so. So
13 tell me what your pleasure would be, then I'll hear from
14 Mr. Gardner.

15 MR. MCCARTHY: Your Honor, I think ten days will be
16 plenty sufficient for a bench trial in this matter.

17 THE COURT: what date would you like? I mean, right
18 now a discovery deadline of April 29 would mean that we
19 could -- and a dispositive motions deadline of May 28 allow for
20 the briefing. Usually in dispositive motions with bench
21 trials, I have found that it doesn't always work out this way
22 but many times it works out that we just go ahead and have a
23 bench trial as opposed to -- that's probably the tightest way
24 for the record as I was suggesting to Mr. Norris.

25 So that if we have the briefs finished by May 28th, reply

Preliminary Injunction Hearing 12/14/23

1 briefs, we could set this in for July at the earliest, but when
2 you run into summer calendars or whatever, it seems to me that
3 my instincts are telling me the safest, most definitive trial
4 date which would not get bumped for vacation plans or anything
5 would be a maybe like a week after Labor Day next September and
6 then we move back everything from that date. But I'll hear
7 from you in terms of what your pleasure would be.

8 MR. MCCARTHY: Your Honor, obviously we would like to
9 process this as quick as possible that allows us sufficient
10 discovery. I think in terms of when a trial might be, I
11 appreciate Your Honor's concern about summer schedules and the
12 like. I don't know that I can give Your Honor a date right
13 now.

14 I'm certain if you allowed the parties to consult for even
15 24 hours we could probably come up with something in the time
16 that you're thinking of. It would probably end of summer, and
17 certainly no later than September.

18 THE COURT: And I could be wrong, I have a discovery
19 deadline here of April 29, but I could be wrong about that. It
20 could be maybe you feel that a discovery deadline and discovery
21 could be moved up to some extent.

22 MR. MCCARTHY: I would imagine, and I don't want to
23 speak for our friends on the other side here, but I'm certain
24 that if we could put our heads together we could probably come
25 up with something in terms of a schedule for the Court within a

Preliminary Injunction Hearing 12/14/23

1 few business days.

2 THE COURT: write these dates down, so the measuring
3 marks.

4 The scheduling order that would go, and I'm not going to
5 file it tomorrow, it would normally be filed tomorrow, would be
6 you make a report about deposition hours December 28th. You
7 would -- essentially moving for additional parties would not be
8 a factor here, but you have your Rule 26 disclosures by
9 February and March. You have a discovery deadline of April 29.
10 A request for admissions May 6th. Dispositive motions deadline
11 May 28. And then we could stick in a trial date, say, in July,
12 whatever you want. I'll make my calendar around yours. If I
13 have any criminal trials scheduled those days, I will have
14 those reassigned. You all will take high priority on this, so
15 I'm more than willing to work with you on it.

16 MR. MCCARTHY: Appreciate that, Your Honor.

17 THE COURT: So you let me know you. And you and
18 Mr. Gardner can talk about it. You probably should allow the
19 input of Mr. Anderson and Mr. Norris because I know Mr. Gardner
20 will ask Ms. Yang and Mr. Mendez and Ms. Gargeya because their
21 vacation schedules are really adversely affected by it and
22 they're the ones that will be buried on the computer, so you
23 know.

24 MR. MCCARTHY: We appreciate that, Your Honor.

25 THE COURT: You just let me know. I will schedule

Preliminary Injunction Hearing 12/14/23

1 however you want to schedule it and, as I've said, if suddenly
2 there's an appeal, a stay in terms of a preliminary injunction,
3 everything will stop. You can let me know tomorrow, by e-mail
4 Monday.

5 MR. MCCARTHY: Certainly we can let you know by
6 Monday.

7 THE COURT: Thank you, Mr. McCarthy.

8 MR. MCCARTHY: Thank you, Your Honor.

9 THE COURT: Mr. Gardner, on this I'll let you
10 precariously wade these waters as your young compatriots look
11 up here smiling at me, maybe you and Mr. McCarthy can talk
12 about this. It may not be that April 29th is a necessary
13 discovery deadline. Whatever you think.

14 MR. GARDNER: Sure. And I completely concur, we get
15 along very well. I expect that will continue. The only thing
16 I just want to flag for Your Honor, and I don't expect this is
17 going to be an issue, we think it is critical that there be
18 discovery coordination with the West Point case. We are using
19 many of the same witnesses. They should not be deposed more
20 than once. I am confident we can achieve that goal, but I
21 wanted to flag that for Your Honor that that is I think one of
22 the primary concerns from the Government's perspective.

23 From a trial perspective, my only big concern is that my
24 colleague here is getting married in September, so I want to
25 just be very sensitive to that date.

Preliminary Injunction Hearing 12/14/23

1 THE COURT: Mr. Mendez is getting married in
2 September?

3 MR. GARDNER: He is.

4 THE COURT: Congratulations, Mr. Mendez.

5 MR. MENDEZ: Thank you very much.

6 THE COURT: Have you warned your spouse as to what it
7 means to be married to a lawyer? I assume your spouse --

8 MR. MENDEZ: She has an idea, yeah. I've been
9 practicing for five years so she has an idea already.

10 MR. GARDNER: And I didn't mean to embarrass him.

11 THE COURT: Make sure your spouse doesn't call my
12 wife. I will tell you that.

13 (Laughter.)

14 MR. GARDNER: And I didn't mean to embarrass him but
15 I do want to celebrate him. But in terms of -- we can work
16 collaboratively. I think the only other thing I would say, and
17 this is obvious, is that the quicker we go I think the more we
18 need to think about, you know, framing discovery narrowly so
19 that we can get this done. So I think if they are willing to
20 cooperate in terms of reasonable discovery, you know,
21 limitations, I don't see why this should be a problem.

22 THE COURT: That's fine. I would note that this
23 is -- I'm not trying to rush what's going on up at West Point.
24 I mean, the facts may or may not be different in terms of some
25 questions I have. This is probably dangerous to say this after

Preliminary Injunction Hearing 12/14/23

1 Navy failing on the goal line against Army last Saturday.

2 (Laughter.)

3 MR. GARDNER: You're in a hostile audience now, Your
4 Honor.

5 THE COURT: Two Naval officers are trying to smile
6 but they can't get a smile out. But the point is that it may
7 be different numbers. I'm more than a little interested in
8 terms of the 91 percent Chief of Naval Operations, 40 percent
9 flag rank, and it may not be the same numbers as to West Point.
10 I don't know what the numbers are.

11 MR. GARDNER: Absolutely. And I'm not suggesting the
12 facts are going to be identical. All I'm saying is many of our
13 witnesses are the same witnesses, for example experts. And
14 again, I am confident we'll be able to work collaboratively.

15 THE COURT: That's fine. Just get an e-mail to my
16 chambers on Monday, and don't make it 5 o'clock on Monday.
17 Just sometime Monday during the day get an e-mail to my
18 chambers about this and we will enter an order today with
19 respect to for the reasons set forth on the record and to be
20 further developed and explained in an opinion to follow
21 shortly, the motion for preliminary injunction in this matter
22 is denied for the reasons set forth on the record and to be
23 developed more fully in an opinion, and then I will await the
24 issuing of a scheduling order when you get back to me.

25 And as I say, I'll make this work. We will make this

Preliminary Injunction Hearing 12/14/23

1 work. This is very important and I've got it and I know
2 there'll be a history of it. And clearly my view is, as I
3 indicated to Mr. Norris, when the time is right it clearly is
4 going to go up to the Fourth Circuit and it may or may not go
5 to the Supreme Court. But I think it's important to get the
6 record as developed now as we can and then up it goes because,
7 along with the issues you've raised, I may or may not have
8 raised issues that you haven't thought about because I have
9 several times some of the issues raised by the plaintiffs
10 certainly struck a nerve with me, but I'm like, well, we have
11 to develop the factual record. I don't know what the factual
12 record is so we have to develop a record on it. So that's
13 where we are.

14 Okay. Well, thank you. Unless there's anything else,
15 thank you all very much. And I thank Ms. Herndon here for her
16 work, and Ms. Longmore particularly, thank you for keeping up
17 with me a few times when I got rolling.

18 Okay. So with that, this Court stands adjourned for the
19 day. Thank you very much.

20 (The proceedings concluded at 4:48 p.m.)
21
22
23
24
25

Preliminary Injunction Hearing 12/14/23

CERTIFICATE OF OFFICIAL REPORTER

I, Amanda L. Longmore, Registered Professional Reporter and Federal Certified Realtime Reporter, in and for the United States District Court for the District of Maryland, do hereby certify, pursuant to 28 U.S.C. § 753, that the foregoing is a true and correct transcript of the stenographically-reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 18th day of December 2023

-S-

AMANDA L. LONGMORE, RPR, FCRR
FEDERAL OFFICIAL COURT REPORTER

Preliminary Injunction Hearing 12/14/23

1	23 [3] - 26:8, 12; 41:6 23-year [1] - 41:22 24 [2] - 88:20; 118:15 24.5 [1] - 88:18 245 [1] - 114:2 26 [2] - 116:3; 119:8 27 [1] - 82:16 27th [1] - 82:14 28 [2] - 117:19; 119:11 28th [4] - 115:24; 116:5; 117:25; 119:6 29 [4] - 116:4; 117:18; 118:19; 119:9 29th [3] - 8:21; 39:5; 120:12	22 60-some [1] - 12:8 600 [1] - 21:13 61 [1] - 82:8 62.8 [1] - 64:2 64 [2] - 36:3; 82:11 65 [1] - 21:25 650 [2] - 34:7; 104:7 66 [1] - 107:4 67 [1] - 79:24 6th [5] - 7:21; 8:17; 39:6; 70:10; 119:10	able [19] - 13:3; 14:1; 17:12, 25; 22:11, 13; 23:24; 25:14; 27:25; 32:9; 35:15; 51:11, 16; 61:1; 66:18; 71:22; 103:19; 108:16; 122:14 abroad [1] - 89:10 absence [1] - 24:13 absent [2] - 11:13; 31:8 absolute [2] - 54:24; 103:10 absolutely [16] - 24:7; 37:8; 43:4; 46:17; 55:1; 59:22; 60:16; 62:12; 64:10; 71:22; 85:17; 86:22; 94:15; 98:24; 109:7; 122:11 Absolutely [1] - 103:23 absurd [1] - 55:16 abundant [1] - 23:21 academic [1] - 81:4 academies [20] - 7:2, 4; 9:16, 18; 15:3; 16:22; 32:23; 33:1; 38:20, 22; 39:24; 43:10, 15; 47:17; 58:14; 77:25; 78:1; 91:6; 99:10; 100:15 Academy [103] - 2:4; 4:9, 13-14; 6:15; 7:8, 10; 9:24; 10:10; 15:3; 16:22; 17:16; 20:22; 21:5, 13; 24:13; 25:7, 17; 27:2; 28:12, 18; 32:6, 8; 34:3, 25; 36:5, 10; 42:22; 46:2; 50:13, 17, 23; 53:8; 54:5, 13; 57:11, 23, 25; 59:9; 60:3, 11; 61:23; 62:4, 8, 15, 21, 24; 63:24; 64:5, 9;	65:7, 19; 72:2, 7, 9, 11, 16; 73:3, 6, 18; 74:12; 75:13, 15-16, 20; 78:16, 20, 23; 81:23; 82:8, 15, 25; 84:5, 18; 85:11, 14; 88:19; 91:21, 24; 92:4, 19, 23; 93:8; 95:8, 20, 25; 96:11, 13, 21; 97:14; 99:18; 101:16, 18, 21; 105:10; 106:24; 107:7; 109:11; 113:21; 114:17 academy [1] - 85:4 Academy's [15] - 7:15; 13:15; 15:4, 24; 39:18; 63:18; 72:4; 74:14; 78:6, 11; 89:23; 90:19; 93:3; 97:24; 114:13 accelerate [1] - 108:10 accept [1] - 28:6 acceptance [1] - 40:15 accepted [3] - 36:4; 66:3; 82:18 Access [1] - 6:4 access [1] - 6:9 accomplish [1] - 96:1 accomplishing [1] - 65:3 according [5] - 6:17; 8:6; 14:8; 57:21; 61:21 accordingly [3] - 31:23; 38:8; 95:10 account [1] - 76:4 accounts [1] - 62:24 accurate [4] - 29:6; 33:7; 60:16; 70:5 accuse [1] - 116:25 achieve [8] - 48:5; 51:18; 52:10; 62:16; 67:22;	92:2; 93:15; 120:20 achieved [2] - 64:8; 103:4 achieving [8] - 48:12; 51:20, 25; 53:6, 23; 54:1; 60:9; 100:22 acknowledge [4] - 13:8; 24:6, 8 acknowledged [5] - 10:20; 28:13; 64:5; 72:7; 82:10 Acting [1] - 4:14 Action [2] - 8:24; 88:2 action [2] - 7:9; 30:9 actual [2] - 13:14; 75:2 Adarand [2] - 53:12; 67:6 add [1] - 33:25 added [1] - 82:23 addition [1] - 81:11 additional [4] - 21:11, 19; 81:17; 119:7 address [12] - 9:17; 12:1; 27:1; 31:15, 21; 58:14; 84:8; 89:21; 93:16; 94:3, 23; 108:17 addressed [3] - 31:14; 50:14; 110:9 addresses [1] - 98:15 addressing [2] - 6:5; 93:17 adjourned [1] - 123:18 adjusted [1] - 95:10 Admiral [4] - 4:13; 7:11; 62:3; 67:14 admiral [1] - 67:14 Admirals [2] - 72:24; 73:25 Admission [4] - 6:14; 80:12, 17 admission [10] - 16:23; 18:4; 26:9; 36:4;				
1 [3] - 62:24; 63:24 1.2 [1] - 101:5 10 [2] - 10:10; 47:9 100 [1] - 62:25 11 [4] - 28:21, 23; 56:12; 87:11 12 [2] - 67:17; 116:3 12th [1] - 8:10 13 [2] - 79:9; 89:13 14 [2] - 28:21; 62:19 15 [6] - 36:4; 82:17; 89:14; 109:21; 112:4 16 [1] - 57:3 16th [1] - 27:14 17 [1] - 96:7 174 [1] - 82:15 18 [2] - 41:10, 21 180-degree [2] - 109:3, 7 1814 [1] - 70:15 19 [2] - 41:10, 21 19.1 [1] - 88:18 1948 [1] - 102:18 197 [1] - 114:7 1986 [1] - 83:22 1st [3] - 35:22; 81:25; 82:1	3 3 [2] - 96:7; 98:15 30 [2] - 73:7; 74:1 31st [2] - 35:23; 82:2 327 [1] - 76:5 335 [1] - 114:2 35 [1] - 12:8 3rd [1] - 2:8	7 7 [1] - 109:21 70 [1] - 90:16 70,000 [5] - 79:13, 17, 19; 80:20 74 [2] - 79:11; 80:21 75.5 [1] - 64:3 78 [1] - 78:21 79 [1] - 91:19	8 8 [1] - 28:22 802 [1] - 114:3 81 [1] - 64:4 8453 [1] - 10:11 8th [1] - 8:7	9 9 [1] - 36:21 91 [6] - 57:24; 61:20, 22; 73:2; 95:23; 122:8 915 [1] - 114:7 95 [1] - 72:11 952 [1] - 114:3 99 [1] - 95:23	A abandoned [1] - 96:22 abdication [1] - 84:20 abilities [1] - 50:19 ability [7] - 37:3; 67:18, 20; 71:23; 79:22; 80:1; 108:20	20 [1] - 116:20 2001 [1] - 114:2 2002 [1] - 88:20 2003 [1] - 9:2 2008 [2] - 30:25; 80:6 2009 [1] - 23:5 2010 [2] - 54:8; 88:18 2018 [1] - 38:1 2019 [1] - 114:8 2023 [1] - 73:8 2024 [5] - 26:13; 43:15, 17; 73:8; 116:4 2025 [2] - 26:16; 27:15 2026 [2] - 28:18; 88:21 2027 [1] - 28:19 21 [1] - 104:8 213 [1] - 94:16	4 4 [5] - 7:2; 9:14; 38:20; 59:4; 98:14 40 [6] - 62:3; 72:15; 73:7; 88:20; 106:23; 122:8 4:48 [1] - 123:20	5 5 [4] - 62:24; 63:24; 78:23; 122:16 50 [1] - 62:21 55 [1] - 21:23 550 [1] - 21:14 56.5 [1] - 64:3 58 [1] - 81:10 59 [1] - 64:1	6 6 [2] - 62:20, 25 60 [4] - 43:18-20,

Preliminary Injunction Hearing 12/14/23

81:12; 82:12; 84:18; 90:19, 21; 94:10 admissions [60] - 6:17, 20; 7:15, 25; 9:4, 15; 10:9; 13:15; 15:5; 34:6, 11; 35:20, 23, 25; 36:1, 7, 13, 17; 43:16; 46:23; 51:20; 52:12, 20; 53:3, 10; 54:5, 12; 55:21; 58:23, 25; 62:15, 19-20; 65:19, 21; 68:25; 74:15; 78:7, 11, 22, 24; 80:24; 81:24; 82:25; 83:2, 8; 87:18; 90:6, 23; 91:1, 14; 95:9; 96:4; 99:18; 101:5; 114:14; 116:4; 119:10 Admissions [7] - 2:4, 18; 3:6; 4:12; 6:22; 78:19; 114:9 admit [2] - 91:21, 24 admits [1] - 21:5 admitted [8] - 17:13, 15; 20:22; 60:10; 81:19; 85:14; 90:9; 95:14 admittedly [1] - 97:16 advance [2] - 10:4; 85:15 advancing [1] - 25:11 adversely [1] - 119:21 advisory [1] - 27:5 advocacy [2] - 10:22; 71:8 advocate [2] - 66:5; 70:4 affairs [1] - 85:23 affect [2] - 99:12; 111:17 affected [2] - 101:5; 119:21 affidavit [1] - 21:12 affidavits [2] -	77:20; 110:10 affirm [1] - 13:6 affirmed [1] - 11:23 afford [2] - 85:21; 100:23 afraid [3] - 55:13; 57:17; 70:25 African [3] - 73:19; 76:17; 106:25 afternoon [8] - 2:22; 4:17, 23; 5:2, 6; 60:18, 23; 73:22 age [5] - 26:8; 41:6, 22; 44:2; 54:22 ages [2] - 26:12; 41:7 ago [6] - 2:11; 3:11; 8:10; 31:10; 39:22; 100:13 agree [4] - 33:16; 46:16; 74:8; 85:17 agreeable [3] - 12:13, 16 agrees [1] - 46:13 ahead [5] - 66:14, 20; 89:21; 113:17; 117:22 aid [1] - 74:20 all-volunteer [3] - 56:22; 57:2, 4 allegation [1] - 7:14 allegations [1] - 46:20 alleged [5] - 17:5; 25:24; 40:7; 57:5 alleging [1] - 25:14 alleviate [1] - 89:4 allow [4] - 18:1; 96:1; 117:19; 119:18 allowed [5] - 13:23; 36:1; 37:2; 65:14; 118:14 allows [1] - 118:9 almost [6] - 28:8; 52:14; 69:13; 110:5 alone [2] - 50:11; 89:6 alter [4] - 98:2;	114:4, 10 alternate [1] - 81:16 alternative [1] - 53:21 alternatives [7] - 47:11; 51:23; 52:9, 14; 90:1; 95:17, 21 ambiguity [1] - 32:22 ambit [1] - 23:3 Amen [1] - 19:22 Amendment [4] - 9:1; 34:16; 38:6; 95:12 Amendment's [2] - 7:16; 114:14 American [7] - 5:11; 57:18; 70:9, 25; 75:5; 106:25 Americans [4] - 32:10; 62:19; 73:19; 76:17 amicus [5] - 5:9; 39:21; 77:14 amorphous [1] - 9:11 amount [2] - 24:3; 101:7 ample [1] - 42:19 analogous [2] - 93:22; 94:4 analogy [1] - 113:1 analysis [13] - 11:7; 37:6; 44:24; 45:8; 49:20; 61:18; 75:25; 79:15; 87:2; 102:21; 106:15; 107:25; 114:17 Analytics [1] - 87:13 analyze [1] - 71:7 ANDERSON [5] - 3:2, 8, 14, 17, 21 Anderson [4] - 3:2, 4; 8:13; 119:19 Anderson's [1] - 44:5 Annapolis [1] - 9:24 annually [1] - 95:8 anonymous [5] -	19:7; 23:23; 24:22; 25:13; 27:7 anonymously [2] - 13:16, 23 answer [7] - 42:3; 47:15; 52:7; 71:22; 93:18; 94:14; 108:8 answers [1] - 113:18 anticipate [1] - 116:9 anytime [1] - 49:10 anyway [2] - 21:4; 35:16 apex [1] - 98:12 apiece [1] - 17:23 apologize [2] - 85:15; 113:11 appeal [13] - 24:9; 105:9; 108:21; 109:13; 110:3; 13; 111:5, 9, 20; 112:18; 115:13, 16; 120:2 Appeals [1] - 106:10 appear [2] - 26:14; 69:5 appearance [4] - 3:7, 13, 20 appellate [1] - 105:14 applicant [3] - 79:1; 81:15, 18 applicant's [3] - 9:3; 79:3; 90:7 applicants [13] - 25:16; 47:7; 51:4; 79:13; 80:19; 81:12; 83:7; 90:10, 14, 20; 95:14 applicants' [1] - 7:24 application [6] - 17:8; 22:10; 35:23; 89:2, 9; 104:5 applications [1] - 82:2 applied [7] - 17:7; 22:14; 41:9; 46:13 applies [9] - 44:24; 49:20; 70:25; 76:7; 84:23; 86:20;	97:14, 24; 112:11 apply [20] - 16:19; 22:11, 14, 18; 25:14; 26:8, 15; 42:22; 47:9; 49:18; 64:15; 72:4; 75:15; 84:4, 12, 24; 97:22; 98:3; 103:16 applying [1] - 97:25 appointee [1] - 81:17 appointees [1] - 21:20 appointment [1] - 82:5 Appointment [1] - 82:16 appointments [1] - 96:10 appreciate [7] - 32:4; 105:3; 113:6; 118:11; 119:16, 24 approach [1] - 78:23 appropriate [4] - 24:5; 87:23; 88:8; 93:7 appropriately [1] - 87:23 approved [1] - 94:20 approvingly [1] - 95:1 April [7] - 35:24; 82:7; 116:3; 117:18; 118:19; 119:9; 120:12 apt [1] - 113:1 aptly [2] - 45:7; 57:13 arbitrary [3] - 48:2; 97:18; 104:16 area [1] - 21:2 areas [2] - 2:7; 85:22 argue [4] - 14:25; 31:23; 90:23; 92:18 argued [3] - 45:11; 106:20; 113:16 arguing [6] - 17:11, 13; 33:13; 45:13;	86:23 argument [30] - 10:16; 12:2, 19; 15:2, 6; 18:5; 19, 22; 20:16; 21:3; 23:1; 25:11; 26:18; 28:7; 31:25; 39:11; 58:21; 63:17; 66:2; 71:13, 25; 96:2, 20; 97:21; 98:4, 8; 99:9, 16; 107:17 argument's [1] - 18:24 arguments [5] - 26:18; 96:8; 104:11, 14; 109:5 Army [4] - 63:9; 65:23; 122:1 Article [3] - 19:4; 22:17, 19 articulated [1] - 99:4 articulating [1] - 100:18 ascertaining [1] - 13:18 Asian [1] - 64:7 aside [2] - 25:24; 116:13 aspect [1] - 69:7 aspersions [1] - 78:12 asserted [2] - 37:23; 76:1 asserting [1] - 45:13 assess [10] - 19:1; 20:21; 51:16; 59:5; 66:18, 20, 22 assessed [1] - 91:4 assessing [1] - 76:22 assessment [4] - 79:18; 81:14; 90:17 assigning [1] - 9:10 assistant [1] - 2:13 associated [1] - 87:14 Association [1] - 5:10 assume [8] - 41:8;
---	--	--	---	---	---

Preliminary Injunction Hearing 12/14/23

50:5, 14, 17, 19, 22; 97:14; 121:7 assumed [2] - 36:22; 108:24 assumes [2] - 49:25; 111:3 assumption [2] - 91:15, 22 assumptions [11] - 51:1, 4; 54:18, 20; 55:4, 10-11; 72:1, 5; 92:8 Assurance [7] - 21:8; 36:2; 79:5; 80:16; 82:16 assure [1] - 70:20 athletes [4] - 28:14, 22-23; 80:3 athletic [1] - 80:1 attached [1] - 81:25 attack [2] - 70:11, 13 attacked [1] - 70:14 attempt [1] - 89:4 attend [2] - 9:24; 10:1 attended [1] - 52:15 attending [3] - 41:13; 42:13, 16 attest [1] - 14:6 attorney [1] - 3:6 attractive [1] - 51:13 audience [1] - 122:3 August [6] - 43:16, 22, 24-25; 44:1, 9 auspices [1] - 112:23 Austin [2] - 4:9; 7:11 authorities [2] - 30:1; 83:23 authority [3] - 23:21; 24:4, 7 available [1] - 6:9 avenue [1] - 22:6 avenues [1] - 38:17 avoid [1] - 54:21 await [3] - 66:1; 70:3; 122:23 aware [1] - 105:17 awhile [2] - 19:18; 52:11	B B.R. [2] - 19:3; 20:14 backed [1] - 67:25 background [3] - 50:10; 82:19; 91:23 backgrounds [2] - 65:22; 67:21 bad [3] - 67:10 baggage [1] - 35:6 bags [1] - 44:5 bailey [1] - 92:15 balance [11] - 11:13; 12:3; 31:4, 24; 35:12, 14; 44:25; 45:4; 63:12 balancing [3] - 44:25; 49:14; 68:7 Baltimore [4] - 31:10; 38:5; 70:16; 105:20 banned [2] - 52:11; 53:3 bar [4] - 24:5; 26:7; 28:7; 29:3 bare [5] - 13:13, 20; 17:22; 41:7; 66:19 bare-bone [2] - 13:13; 17:22 bare-bones [1] - 41:7 barred [2] - 40:16; 99:17 barrel [1] - 71:16 barrier [3] - 16:18; 24:14; 25:24 barriers [2] - 16:21; 28:3 based [27] - 6:20; 9:10; 31:12; 32:10; 46:23; 49:21; 50:11, 24; 53:10; 54:12; 55:13, 21; 56:14; 58:23; 66:12; 74:23; 76:12; 81:13; 82:23; 89:1, 11; 92:7; 94:17; 96:25; 101:11; 104:3 baseless [1] - 55:14 basic [2] - 31:13;	67:1 basing [2] - 21:12; 76:13 basis [3] - 53:18; 78:25; 103:14 battle [3] - 72:14; 77:6; 103:1 battlefield [2] - 69:24; 92:1 bear [1] - 63:21 bearing [1] - 46:8 bears [2] - 29:10; 103:18 Beautiful [2] - 31:10; 34:14 become [3] - 9:22; 42:24; 84:5 becomes [3] - 10:6; 27:5; 103:5 becoming [2] - 62:3; 67:2 beginning [5] - 51:7; 72:6; 82:6, 12, 22 begins [1] - 81:24 begun [1] - 107:3 behalf [4] - 2:18; 4:8; 5:10; 19:7 behind [1] - 116:23 beings [1] - 48:25 belie [1] - 111:1 below [3] - 26:12; 79:7, 17 bench [25] - 10:18, 20; 14:4; 27:8; 30:10; 60:21; 71:19; 104:25; 105:20, 24; 112:4-6, 9; 113:17; 115:23; 116:8, 13-14, 17, 20; 117:16, 20, 23 benchmark [1] - 76:23 benefit [4] - 39:12; 47:7; 49:22 benefits [1] - 49:21 Benisik [2] - 37:25; 43:8 best [7] - 12:9; 59:5; 71:22; 110:19; 114:22; 115:5, 11 better [6] - 10:1;	39:14; 54:14; 66:20; 71:4 between [16] - 16:17; 17:16; 48:11; 51:25; 53:4; 68:19, 21; 69:25; 75:16; 76:24; 77:2; 82:6; 84:21; 92:6; 93:14; 96:12 bidding [2] - 41:1, 4 bifurcate [1] - 49:1 big [5] - 17:1, 11; 36:12; 48:11; 120:23 bit [6] - 8:19; 28:16; 69:4; 78:9; 100:25; 101:2 Black [7] - 5:10; 62:19; 64:8; 72:21, 23; 73:4; 90:9 black [1] - 34:8 blends [1] - 107:12 blow [2] - 58:18; 59:21 Blue [1] - 80:3 bluntly [1] - 64:5 board [3] - 55:11; 71:1 body [1] - 87:6 Bollinger [1] - 9:2 bombshell [1] - 43:10 bone [2] - 13:13; 17:22 bones [1] - 41:7 boosted [1] - 2:10 booster [1] - 2:10 boot [1] - 85:4 Boston [1] - 4:2 bottom [3] - 3:10; 41:11; 81:17 box [2] - 34:8; 48:17 boys [1] - 40:18 Branch [2] - 71:1 branches [1] - 99:13 breaker [1] - 80:25 brief [28] - 5:9; 20:16; 21:3; 23:1; 29:4; 33:25; 36:9;	39:21; 48:14, 16, 24; 62:14; 63:18; 77:15; 78:11; 79:9; 82:1; 96:6; 97:9; 100:1; 101:13, 17; 104:8; 107:5; 109:1 briefed [2] - 8:5, 18 briefing [9] - 8:6; 12:6; 13:8; 45:25; 81:23; 102:10; 113:16; 117:20 briefings [1] - 86:17 briefly [2] - 23:18; 95:17 briefs [4] - 77:15; 115:19; 117:25; 118:1 bring [1] - 39:25 bringing [1] - 86:19 brings [1] - 7:9 British [1] - 70:15 broad [2] - 48:6; 67:15 Bruce [2] - 4:11; 7:11 build [1] - 74:19 building [2] - 107:13; 108:1 bumped [3] - 116:19, 21; 118:4 burden [16] - 9:6; 13:12; 18:6, 9; 46:8; 54:17; 55:6, 8; 60:12, 17, 19; 89:18 Bureau [2] - 92:25; 93:6 buried [1] - 119:22 business [2] - 106:11; 119:1 busy [3] - 11:23; 111:11, 19	53:1; 98:9 cam [1] - 2:22 candidate [2] - 79:18; 81:15 Candidate [1] - 10:2 candidate's [1] - 81:9 candidates [7] - 79:7, 16; 80:18; 82:17; 90:13; 91:22, 25 cannot [12] - 17:15, 21; 18:9; 25:25; 26:8; 31:7; 34:19; 40:3, 5; 51:8; 72:17; 78:5 capable [1] - 17:14 capacities [3] - 7:12 capacity [5] - 4:10-12, 14; 34:8 Capitol [3] - 70:11, 13 care [2] - 13:1; 50:15 careful [3] - 32:17; 64:11; 104:10 Carlos [2] - 4:10; 7:11 Carolina [12] - 6:19; 8:23, 25; 14:17; 30:12; 105:24; 112:5, 8; 116:15 carriers [1] - 72:13 carries [1] - 35:6 carve [1] - 91:6 carved [2] - 39:23; 75:19 case [131] - 2:3, 8; 7:9, 14; 8:3; 9:5; 10:9; 13:8, 22; 14:8; 16:2; 18:25; 19:3, 5, 8, 10-11, 17; 20:5, 15, 25; 21:1; 24:9; 25:9; 26:3; 28:8; 29:9; 30:16; 31:9; 32:5, 7, 11, 13; 34:4, 7, 14, 21; 35:12; 37:25; 38:2, 9, 16-17; 39:22; 40:13,
				C calendar [2] - 117:12; 119:12 calendars [1] - 118:2 calibrate [1] - 76:4 California [2] -	

Preliminary Injunction Hearing 12/14/23

17; 42:1, 4, 23; 43:7; 44:20; 46:6; 52:20; 56:11, 18; 57:9, 19; 60:21; 61:19; 62:10; 63:18, 21; 66:1, 4; 67:13; 68:1; 69:9, 11; 70:18; 71:7, 14; 72:25; 73:17; 76:25; 77:1, 3, 15, 21; 83:21; 84:9; 86:4; 87:21; 91:5; 93:22, 24-25; 94:25; 98:6, 8, 20, 23; 99:8, 21, 23; 100:18; 102:4; 103:15; 104:10, 22; 105:3, 7, 13; 106:14, 16-17; 107:2; 109:8, 19; 111:4, 9, 12-14; 112:21, 24; 114:16; 115:1, 19; 116:21; 117:10; 120:18 cases [18] - 10:24; 13:24; 16:18; 20:19; 23:2, 7, 22; 25:10; 40:10, 24; 41:1; 53:11; 64:25; 67:6; 98:5, 9; 101:4 casting [1] - 78:12 catchalls [1] - 48:6 categories [15] - 47:21; 48:2, 9, 15; 49:3; 92:18, 21, 24; 93:7, 11, 13; 97:17; 104:17 categorize [2] - 48:7, 15 Catherine [1] - 4:23 causes [1] - 67:5 causing [1] - 88:7 celebrate [1] - 121:15 Census [2] - 92:25; 93:6 census [2] - 47:25; 48:7 certain [10] -	18:21; 44:2; 48:23; 67:4, 11; 106:20; 118:14, 23 certainly [26] - 14:7; 24:10; 26:13, 23; 42:19; 45:4, 18; 46:12; 48:4; 57:18; 77:21; 103:20; 106:16; 109:10, 17, 23; 111:1; 112:20; 114:9; 115:14; 116:6, 13; 118:17; 120:5; 123:10 cetera [3] - 52:22; 116:2 chain [9] - 60:3, 10; 61:11; 62:14, 23; 64:13; 73:2; 84:6; 103:9 chair [1] - 18:15 challenge [6] - 16:18; 38:7; 46:6; 56:22; 85:3; 95:24 challenged [3] - 12:22; 38:14; 39:19 challenging [4] - 15:22; 39:18; 80:8 chambers [3] - 23:20; 122:16, 18 change [4] - 15:9; 86:9; 98:2; 116:21 changing [1] - 94:13 characterization [1] - 78:18 characterize [1] - 58:21 characterized [1] - 89:2 check [1] - 48:17 checked [1] - 112:6 chefs [1] - 102:17 Chief [19] - 9:9; 32:24; 33:14; 38:19; 39:4; 56:17; 57:23; 58:25; 59:4, 22; 73:2; 94:7, 16; 99:1; 101:6;	103:12; 107:20; 114:21; 122:8 Chiefs [4] - 61:20, 22; 73:25; 106:25 child [1] - 40:14 chime [1] - 6:8 Chip [1] - 80:3 choice [1] - 115:21 choose [1] - 22:2 chose [3] - 15:11; 42:22 Chris [1] - 5:2 chunk [1] - 36:12 Circuit [39] - 19:3, 5; 20:14; 24:4, 10; 30:20; 31:9; 40:17; 105:15, 18-19; 106:11, 19; 107:17; 109:1, 9, 14, 19, 21; 110:8, 13; 111:1, 8, 13, 19, 24; 112:1, 7, 19; 114:1, 6-7; 115:14, 17, 19; 123:4 circumstance [2] - 81:19; 90:8 circumstances [4] - 30:20; 90:16, 19; 114:1 62:13 citation [1] - 62:13 cite [7] - 20:16; 24:9; 40:10, 13, 18, 24 cited [13] - 23:2; 24:1; 43:8; 62:8; 68:9; 69:15; 87:21; 95:1; 98:5, 7; 101:6; 112:3 cites [1] - 114:3 citing [1] - 93:9 citizens [2] - 98:7, 19 City [1] - 109:19 Civil [3] - 2:4; 5:11 civil [1] - 116:20 civilian [10] - 9:25; 15:9, 13; 47:23; 72:2, 7; 77:2; 99:11, 15, 17 claim [5] - 38:7; 40:7; 44:16; 80:25; 114:13	Claims [1] - 40:25 claims [4] - 13:22; 16:10; 39:13; 88:24 clarification [1] - 94:15 clarify [2] - 78:14; 80:23 clarity [1] - 113:6 Clark [1] - 77:18 class [8] - 27:15; 28:18; 60:10; 73:8; 81:3; 88:21; 93:4 classes [1] - 28:20 classification [1] - 89:7 classifications [4] - 6:17; 65:1; 88:25; 93:8 classified [1] - 98:19 classify [1] - 98:7 classifying [1] - 9:10 classroom [1] - 91:17 classrooms [1] - 94:5 Clause [1] - 8:25 clear [23] - 14:5; 15:20; 29:14; 30:6; 31:8; 32:16; 36:10; 38:18; 46:10; 47:14; 60:15; 63:16; 78:12; 82:19; 84:20; 94:22; 96:5; 97:13; 102:2; 106:6; 113:8; 114:12 cleared [1] - 17:18 clearly [19] - 3:25; 24:15; 26:3, 12; 28:12; 33:10; 38:16; 41:18; 45:25; 59:19; 86:20; 91:18; 93:10; 106:9; 109:4; 110:13; 114:16; 123:2 Clerk [2] - 3:9; 5:23 clerks [3] - 29:18; 111:23; 115:7 client [2] - 108:5; 109:24	clients [5] - 22:21; 109:3, 5; 110:24; 111:2 clients' [2] - 109:2, 8 climate [1] - 65:12 climates [1] - 87:14 climbing [1] - 57:25 close [3] - 11:20; 41:10, 21 closed [1] - 73:10 closes [1] - 104:5 Coast [6] - 52:11, 13; 54:7; 96:12, 15 Code [1] - 10:11 cohesion [7] - 48:8; 66:24; 87:1, 8, 24; 88:7 cohesive [4] - 51:12; 74:19; 87:3; 92:12 cohesiveness [3] - 88:8; 103:1, 8 collaboratively [2] - 121:16; 122:14 colleague [10] - 37:20; 74:18, 23; 75:11; 76:7; 86:11; 88:1, 3; 95:18; 120:24 colleagues [3] - 14:20; 110:7; 112:9 College [1] - 6:23 college [10] - 9:25; 10:3; 41:14, 18; 42:13, 17; 44:19; 104:21 color [2] - 32:11; 67:24 combat [7] - 55:24; 58:9; 72:10; 74:20, 24; 92:8; 97:1 combat-ready [1] - 74:20 coming [8] - 36:13; 50:16; 53:8; 61:9; 101:12; 103:10; 104:4, 12 command [6] - 32:12; 74:3; 84:6, 13, 16 commander [1] -	77:18 commanders [1] - 92:1 commands [1] - 92:22 comment [2] - 44:8; 108:1 commission [1] - 10:3 commissioned [1] - 62:5 commissioning [1] - 45:17 commitment [1] - 65:6 committed [1] - 63:11 common [1] - 25:10 community [2] - 51:15; 72:12 comparison [1] - 82:20 compatriots [1] - 120:10 compelling [8] - 52:1; 68:8; 75:9, 21; 83:11; 88:25; 89:8; 91:4 compete [7] - 20:19; 22:9; 27:25; 34:24; 36:14; 40:8, 21 competitive [2] - 22:1, 3 complaint [13] - 6:13; 7:17, 22; 19:11; 29:15; 42:12; 56:11-13; 57:1, 3, 5 complete [3] - 10:5; 77:2; 109:7 completed [1] - 82:2 completely [1] - 120:14 comply [1] - 32:11 compounds [1] - 13:17 computer [1] - 119:22 conceded [3] - 97:25; 104:15, 17 concedes [5] - 47:8, 10, 20; 49:6
---	--	---	--	---	---

Preliminary Injunction Hearing 12/14/23

concept [1] - 52:21	69:25	9:4; 35:11; 49:9; 70:12; 75:4	conversations [1] - 108:14	counteracting [1] - 53:15	18; 16:1, 11, 13; 17:2; 18:10, 15; 19:15, 19, 23; 20:4; 21:12; 22:20; 23:2, 14, 16, 20; 24:15, 18, 22; 25:1, 3; 26:2, 7, 11; 27:8, 18; 28:5, 16; 29:12; 32:16; 33:11, 13; 34:2; 37:5, 9, 15, 17; 38:9, 15, 25; 39:2; 41:12, 17; 42:8, 11, 16, 19; 43:1, 6, 22; 44:7, 12; 46:18; 47:2; 54:9, 16, 18; 55:2, 22; 56:2, 25; 57:7; 59:2; 60:15; 61:3, 25; 63:16; 65:25; 70:2; 71:10, 19, 24; 72:19, 23; 73:15, 24; 76:10; 77:13; 78:13, 19; 79:25; 80:4, 12; 83:19; 84:2; 85:7, 10, 13; 86:1, 17; 91:12; 93:24; 94:6; 97:6, 11; 98:20, 23; 99:23; 100:3, 7, 10; 102:2; 104:25; 105:5, 11; 108:7, 12, 17, 23, 25; 110:19; 111:6, 8, 18; 113:8, 10, 15; 117:17; 118:18; 119:2, 17, 25; 120:7, 9; 121:1, 4, 6, 11, 22; 122:5, 15
concern [4] - 93:17; 103:25; 118:11; 120:23	conscious [2] - 7:15; 114:13	constitutional [17] - 32:12; 34:14, 17-18; 35:3, 7; 36:21; 37:9, 12, 23; 38:1; 43:2; 44:16; 45:6, 14; 46:6	conversely [1] - 90:11	counterproducti ve [1] - 115:2	court [11] - 3:14, 21; 34:16; 42:5; 52:25; 54:6; 55:17; 60:20; 91:3; 96:22; 97:18
concerned [3] - 29:15; 61:19; 93:10	consequence [1] - 77:11	consider [10] - 27:2; 53:10; 77:7; 82:25; 87:17; 89:25; 90:20; 95:3; 96:3, 9	cookie [2] - 56:5; 103:10	country [1] - 50:25	
concerns [4] - 50:24; 88:7; 93:18; 120:22	considerable [1] - 100:10	consult [1] - 118:14	cooks [1] - 102:17	couple [3] - 38:11; 50:13; 97:10	Court [101] - 2:2; 5:23; 6:20; 7:1, 23; 8:21; 9:1, 4, 14; 14:17, 23; 15:13, 15, 20; 16:16; 20:2, 24; 24:2, 4; 26:1, 25; 27:1; 30:23; 31:7; 32:17, 21-23; 33:5, 12, 18, 22; 34:3; 35:5; 36:10; 37:24; 38:1; 39:24; 40:24; 41:2; 42:20; 47:18; 48:9; 49:4; 51:9; 53:11; 56:21; 57:10; 64:14; 65:11; 67:6; 69:9; 75:1, 19; 76:2; 77:6, 9; 78:2, 5, 8; 83:5, 22; 85:9, 17; 86:14; 87:1, 16; 89:2, 17; 90:4, 11; 91:3, 13; 93:10; 95:1; 97:4, 18; 99:4, 16, 19; 102:9; 104:9; 105:15, 19, 25; 106:10, 19; 109:10; 110:9, 14; 112:23; 114:19; 115:1; 118:25; 123:5, 18
concerted [1] - 52:13	consideration [26] - 9:3; 13:20; 27:3; 32:14; 39:18; 59:8; 72:4; 73:11; 74:14; 75:3, 7, 20; 76:8; 77:19; 80:7, 15; 81:2; 87:22; 89:23; 90:1, 23; 91:1, 7; 95:11, 15; 96:22	consumption [8] - 9:13, 22; 32:18; 62:11; 64:6, 12, 21; 77:14	cooperate [1] - 121:20	course [11] - 3:14, 21; 34:16; 42:5; 52:25; 54:6; 55:17; 60:20; 91:3; 96:22; 97:18	
conclude [1] - 34:15	considerations [2] - 42:21; 45:18	contention [2] - 81:1; 93:19	coordination [1] - 120:18	couple [3] - 38:11; 50:13; 97:10	COURT [157] - 2:3, 23; 3:1, 3, 10, 15, 18, 22, 24; 4:6, 19, 22; 5:1, 5, 8, 16; 6:5; 12:16, 18; 13:10; 14:3, 9, 16, 22; 15:14,
concluded [6] - 8:6; 38:5; 83:5; 89:5; 92:4; 123:20	considered [21] - 16:23; 17:14, 21; 18:3; 24:12; 25:16, 23; 26:23; 39:20; 77:9; 78:1; 79:2; 80:18; 81:6, 8; 90:7, 12, 17; 92:19; 95:21; 96:1	contends [2] - 79:5; 92:3	core [1] - 52:20	country [1] - 50:25	
conclusion [2] - 87:7; 91:8	concur [2] - 56:23; 120:14	contention [2] - 81:1; 93:19	corner [1] - 38:10	couple [3] - 38:11; 50:13; 97:10	Courts [8] - 23:4; 37:25; 68:3; 78:9; 88:23; 89:20; 92:20; 98:17
conclusions [2] - 17:25; 97:2	conduct [1] - 112:9	contest [2] - 54:24; 55:3	Corps [26] - 9:22; 10:1, 6; 41:15; 45:20; 49:15; 50:16; 53:8; 59:16; 60:9; 61:14; 63:3; 64:3; 72:10, 22; 73:9, 12; 74:19; 76:22; 88:16; 92:1, 5-6; 99:13; 102:8	course [11] - 3:14, 21; 34:16; 42:5; 52:25; 54:6; 55:17; 60:20; 91:3; 96:22; 97:18	
conclusively [2] - 75:22; 78:18	conclusory [2] - 18:9; 67:15	context [20] - 8:4; 14:15; 19:2; 20:15; 24:19; 29:7; 74:10; 76:5, 16; 79:19; 83:15; 85:2; 86:13; 87:19, 22; 92:22; 93:13; 94:2; 99:7	correct [34] - 3:16; 14:21; 15:17, 19; 16:8, 12, 14; 22:25; 23:10; 24:16, 21; 26:5, 7, 10, 14; 28:15; 37:10, 14; 38:12; 41:12; 42:11, 14-15, 17-18, 22-23; 46:16; 57:4; 59:3; 64:10; 76:19; 94:1	country [1] - 50:25	courtesy [1] - 8:14
concrete [2] - 13:14; 27:23	conduct [1] - 79:18	contextual [1] - 91:1	Corrected [1] - 8:9	couple [3] - 38:11; 50:13; 97:10	
concur [2] - 56:23; 120:14	conducting [1] - 107:25	continually [1] - 94:13	corrected [2] - 21:22; 71:10	couple [3] - 38:11; 50:13; 97:10	courthouse [3] - 2:7; 115:5, 8
conduct [1] - 112:9	confidence [1] - 92:6	continue [3] - 34:10; 43:11; 120:15	correctly [4] - 5:19; 33:15; 35:11; 76:10	country [1] - 50:25	
conducted [1] - 79:18	confident [2] - 120:20; 122:14	continued [1] - 36:23	correlation [4] - 68:19; 69:12, 14, 20	course [11] - 3:14, 21; 34:16; 42:5; 52:25; 54:6; 55:17; 60:20; 91:3; 96:22; 97:18	courtesy [1] - 8:14
conducting [1] - 107:25	confirms [1] - 18:13	continuing [2] - 37:3; 68:24	costs [2] - 53:15, 19	country [1] - 50:25	
confidence [1] - 92:6	conflicts [1] - 67:21	contract [2] - 41:2, 4	Council [1] - 30:25	couple [3] - 38:11; 50:13; 97:10	courtesy [1] - 8:14
confident [2] - 120:20; 122:14	congratulations [1] - 121:4	contradict [2] - 88:9; 91:19	counsel [10] - 2:15, 20; 3:11, 25; 4:15; 5:13; 8:7, 15; 25:19	country [1] - 50:25	
confirm [1] - 18:13	Congress [3] - 28:10; 52:11; 70:20	contradicted [1] - 81:2	count [2] - 7:9; 46:22	country [1] - 50:25	courtesy [1] - 8:14
conflicts [1] - 67:21	congressional [9] - 16:25; 22:16; 27:12; 28:10; 29:8; 82:3; 107:4, 7, 12	contradicts [1] - 79:10	counteract [2] - 53:19; 68:16	country [1] - 50:25	
congratulations [1] - 121:4	Congressman [1] - 27:13	contrary [2] - 66:9, 25		country [1] - 50:25	courtesy [1] - 8:14
Congress [3] - 28:10; 52:11; 70:20	congressmen [1] - 22:1	contribute [2] - 63:5; 69:18		country [1] - 50:25	
connection [1] -	constitution [5] -	control [1] - 106:14		country [1] - 50:25	courtesy [1] - 8:14
		convenient [1] - 12:25		country [1] - 50:25	

Preliminary Injunction Hearing 12/14/23

courtroom [4] - 2:12, 14; 13:2; 43:25 Courts [2] - 35:1, 11 courts [10] - 51:10, 15; 66:18, 23; 76:4; 85:17, 20-21; 105:4, 14 cover [2] - 64:18 COVID [1] - 2:13 crack [1] - 68:11 crank [1] - 51:22 cranked [1] - 52:9 criminal [2] - 116:19; 119:13 crisis [1] - 57:4 criteria [5] - 11:10; 30:22; 31:1; 44:13; 109:15 critical [9] - 72:9, 17; 74:12, 15, 20; 75:7, 16; 92:22; 120:17 critically [1] - 75:24 Croson [1] - 53:12 crucial [2] - 56:10; 110:23 crude [1] - 49:1 curious [1] - 84:14 current [1] - 87:25 cutter [2] - 56:5; 103:10 cycle [5] - 42:24; 43:16; 82:12; 100:6; 108:4 cycles [1] - 32:10	115:23; 116:24; 117:3, 5, 7, 11, 17; 118:4, 6, 12; 119:11; 120:25 dates [1] - 119:2 daylight [1] - 96:11 days [13] - 8:10; 43:18-20, 22; 72:20; 112:5, 9; 116:13; 117:15; 119:1, 13 DC [1] - 20:14 de [1] - 101:10 dead [7] - 111:6, 10, 14; 112:22, 24; 113:2; 116:22 deadline [12] - 17:8; 115:24; 116:3, 5; 117:18; 118:19; 119:9; 120:13 deal [18] - 9:19; 12:2, 10, 18; 29:3; 55:15; 56:4; 57:10; 71:12; 72:25; 103:13; 105:11, 25; 107:3; 109:9; 112:3; 114:23 dealing [9] - 11:18; 24:18; 30:16; 45:21; 73:21; 83:11; 84:4; 94:2, 24 Dean [14] - 4:12; 78:17, 19; 79:10, 23; 80:21; 81:10; 82:7, 11; 90:15; 91:18; 95:13, 19, 22 death [1] - 56:2 debatable [1] - 70:6 debate [3] - 19:14; 20:7; 66:21 decades [3] - 38:13; 69:13; 73:10 December [5] - 8:7, 10; 27:14; 115:24; 119:6 decide [6] - 47:16; 48:10; 50:23; 73:22; 74:5; 106:15	decided [6] - 10:25; 76:23; 99:21; 104:19; 110:17 deciding [4] - 8:2; 20:22; 30:16 decision [23] - 7:2; 9:2; 15:4, 13; 32:24; 33:8; 38:4; 39:9, 12; 45:14; 68:3; 72:3; 75:14; 77:6; 85:3; 88:24; 91:7; 94:8, 23; 109:6; 110:24; 111:17 decisions [8] - 7:25; 21:23; 35:23; 36:15; 63:15; 85:19; 101:6; 109:3 declaration [25] - 18:8; 21:22; 36:3; 67:5, 13, 17; 78:17, 22; 79:11, 24; 80:22; 81:10; 82:7, 15; 87:2, 5, 9, 11; 89:11, 14; 90:15; 91:19; 95:20, 22 Declaration [1] - 8:9 declarations [8] - 13:13; 17:22; 35:24; 41:8; 67:13; 75:22; 77:17; 85:25 declaratory [1] - 30:9 declare [1] - 6:20 declared [1] - 9:9 declined [2] - 9:1, 15 decrease [1] - 65:23 decreased [1] - 95:15 deemed [1] - 79:14 deep [3] - 28:5; 62:9; 83:20 defendant [4] - 45:2, 5; 46:1; 63:24 defendant's [3] - 61:21; 107:5 defendants [12] - 4:8; 7:10, 13, 24; 11:5; 14:1;	16:6, 9; 45:10, 12 defending [1] - 104:7 defense [2] - 12:7; 85:22 Defense [7] - 4:10; 5:12; 10:11; 30:25; 87:6; 96:16, 19 defer [3] - 60:5; 77:10; 99:14 deference [28] - 29:25; 59:25; 77:1, 4, 11; 83:12, 17, 23; 84:9, 23, 25; 85:22, 24; 86:1, 13; 98:1, 6, 11, 13, 15, 18; 100:16, 18-20, 22 deferring [1] - 99:2 define [1] - 93:12 defined [1] - 93:20 definitely [3] - 10:22; 29:2; 113:20 definition [3] - 14:15; 47:12; 83:6 definitive [2] - 97:15; 118:3 degree [1] - 10:4 Del [3] - 4:10; 7:11; 85:2 delay [11] - 37:20, 22; 38:2, 5; 39:3, 24; 40:4; 43:5, 7 delays [1] - 117:8 delta [3] - 51:21, 24; 54:3 demeans [1] - 35:5 demographics [1] - 93:5 denial [1] - 109:13 denied [4] - 45:1; 108:22; 115:3; 122:22 deny [2] - 97:4; 112:13 Department [13] - 4:18, 24; 5:3, 7; 10:11; 31:11; 61:10; 87:6; 96:16, 19, 24	dependent [3] - 28:25; 44:14; 45:8 deploy [1] - 114:25 deposed [1] - 120:19 deposition [3] - 112:22; 116:2; 119:6 depositions [1] - 14:7 Deputy [1] - 5:23 described [1] - 6:16 describes [1] - 87:6 desegregated [1] - 102:19 designed [1] - 48:4 despite [2] - 69:14; 90:1 detail [3] - 13:14; 80:21; 92:15 determination [3] - 52:18; 66:13; 104:16 determinative [7] - 26:16; 81:8; 83:6; 90:5, 8, 18; 101:21 determine [4] - 52:2, 4; 109:14; 114:19 determined [4] - 9:5; 26:13; 33:23; 87:14 determining [1] - 13:19 develop [6] - 72:18; 106:20; 110:11, 16; 123:11 developed [8] - 104:13; 105:23; 112:2; 114:19; 116:11; 122:20, 23; 123:6 developing [1] - 74:20 develops [1] - 110:15 die [1] - 58:10 difference [4] - 53:4; 63:2; 77:2; 83:13 differences [3] - 75:16; 76:3; 83:10	different [16] - 16:21; 50:1; 67:11, 21; 75:21, 23; 78:2, 7; 83:9, 11-12; 92:25; 94:21, 23; 121:24; 122:7 differently [1] - 53:19 difficult [4] - 34:11, 18; 62:18; 103:6 difficulties [1] - 57:1 difficulty [1] - 29:22 diligent [2] - 8:12; 41:25 direct [2] - 10:3; 96:15 directed [1] - 12:8 directives [1] - 10:12 directly [2] - 79:6; 99:12 Direx [1] - 114:3 disability [1] - 25:5 disclosed [4] - 16:5, 9 disclosures [2] - 116:3; 119:8 disconnect [1] - 48:11 discovery [30] - 16:6, 11, 13; 19:8, 13, 15, 20, 24-25; 20:8; 24:16; 25:4; 60:20; 63:21; 66:1; 84:8; 111:10; 114:16; 116:3; 117:8, 18; 118:10, 18, 20; 119:9; 120:13, 18; 121:18, 20 discretion [1] - 2:9 discriminate [2] - 32:9; 65:14 discriminated [2] - 104:21; 108:5 discriminating [1] - 103:14 discrimination [8] - 20:24; 35:4; 36:20; 89:5; 101:8; 103:14
D					
D.M [1] - 40:17 damages [3] - 34:19, 21 dance [1] - 40:19 danger [1] - 95:4 dangerous [1] - 121:25 dare [1] - 65:20 data [4] - 47:25; 74:25; 92:8; 93:6 date [22] - 36:3, 24; 49:6, 12; 82:1; 94:17; 112:15; 114:24;					

Preliminary Injunction Hearing 12/14/23

<p>discussed [3] - 41:5; 52:21; 94:17</p> <p>discussing [2] - 11:11; 45:16</p> <p>discussion [2] - 51:7; 91:18</p> <p>disfavored [1] - 114:5</p> <p>disguise [1] - 68:7</p> <p>Dismiss [1] - 29:5</p> <p>dispair [1] - 73:20</p> <p>displaced [1] - 81:19</p> <p>disposal [1] - 117:9</p> <p>dispositive [5] - 82:21; 117:19; 119:10</p> <p>disproportionall y [1] - 107:8</p> <p>disproportionat e [1] - 62:2</p> <p>dispute [4] - 41:20; 84:21; 90:18; 92:17</p> <p>disputed [1] - 66:7</p> <p>disrespect [1] - 108:25</p> <p>disruption [2] - 36:19</p> <p>disruptive [1] - 36:6</p> <p>dissent [1] - 99:7</p> <p>dissents [1] - 109:21</p> <p>distinct [11] - 7:4; 9:18; 32:25; 33:3, 6, 21; 58:13; 76:8; 93:21; 107:23; 114:20</p> <p>distinction [5] - 16:17; 17:1, 11, 16; 101:19</p> <p>distinguishable [1] - 40:11</p> <p>distinguishing [1] - 76:24</p> <p>District [14] - 7:7, 18; 14:16; 20:2; 24:2; 30:10-12; 40:14, 25; 106:19; 117:2</p> <p>district [2] - 7:20; 105:14</p> <p>diverse [19] - 52:25; 53:4, 13;</p>	<p>63:8; 67:9; 69:22; 73:9, 12; 74:19; 87:3; 88:5, 17, 19; 91:21, 24; 92:5, 12; 95:14</p> <p>diversity [45] - 45:19; 50:6; 52:22; 53:8, 12-14; 56:15; 59:15-18; 60:9; 61:14; 62:16; 63:5; 65:12; 67:16, 19; 68:11; 76:11, 15-16, 22; 87:7, 14; 88:7, 13, 16; 89:12; 90:13; 92:9; 93:23; 94:4; 99:12; 102:5, 8; 103:4, 8</p> <p>diving [1] - 55:11</p> <p>divulge [1] - 73:17</p> <p>Docket [1] - 117:1</p> <p>docket [1] - 3:12</p> <p>documents [1] - 112:23</p> <p>dodges [1] - 38:20</p> <p>DOJ [1] - 20:16</p> <p>domestic [4] - 70:13; 74:21; 89:13</p> <p>dominated [1] - 45:25</p> <p>done [12] - 11:21; 17:19; 18:1, 13, 16-17; 28:2; 82:9; 96:23; 107:11; 121:19</p> <p>doubts [1] - 99:6</p> <p>down [16] - 15:13; 24:16; 27:15; 29:2; 33:2; 44:8; 55:15; 59:2; 62:9; 72:20; 78:8; 89:17; 104:4; 110:7; 113:3; 119:2</p> <p>downright [1] - 53:23</p> <p>Dr [6] - 87:2, 5; 89:11; 92:12, 15</p> <p>draft [1] - 29:19</p> <p>drag [1] - 109:4</p> <p>driver [1] - 82:24</p> <p>drop [3] - 62:13; 63:4; 116:22</p>	<p>due [4] - 54:19; 68:25; 106:10; 110:7</p> <p>during [7] - 16:13; 25:4; 52:12; 54:23; 78:24; 84:8; 122:17</p> <p>duty [1] - 50:25</p> <p>dynamics [1] - 102:24</p>	<p>eliminate [1] - 6:16</p> <p>eliminating [2] - 101:9</p> <p>embarrass [2] - 121:10, 14</p> <p>emphasis [1] - 12:6</p> <p>emphasize [2] - 62:11; 95:7</p> <p>emphasized [2] - 30:15; 32:18</p> <p>employers [1] - 69:7</p> <p>end [28] - 9:11; 17:10; 21:21; 25:22; 26:4; 27:24; 32:7, 11; 49:5, 12; 55:10; 56:18, 20; 58:15; 82:4, 17; 83:2; 90:6; 93:19; 94:11, 17; 97:15; 104:18; 109:6; 118:16</p> <p>endpoint [1] - 93:16</p> <p>ends [8] - 51:10, 17-18, 21; 52:5; 58:17; 68:19; 70:1</p> <p>enemies [2] - 70:12</p> <p>enforce [1] - 35:16</p> <p>enforcement [1] - 87:10</p> <p>enforcing [1] - 35:11</p> <p>engage [4] - 11:2; 50:4; 75:2; 89:24</p> <p>engaged [2] - 83:3; 92:4</p> <p>engages [1] - 49:7</p> <p>enhance [1] - 91:17</p> <p>enhances [2] - 87:7; 92:9</p> <p>enjoin [1] - 109:25</p> <p>enjoy [1] - 10:22</p> <p>enlisted [8] - 10:5; 56:15; 57:25; 61:15; 62:5; 76:13, 17; 102:6</p> <p>Enlisted [2] -</p>	<p>49:16; 92:6</p> <p>ensure [1] - 95:11</p> <p>enter [6] - 3:7, 12, 20; 112:12, 16; 122:18</p> <p>entered [1] - 3:19</p> <p>entertain [1] - 99:16</p> <p>entire [3] - 70:9; 71:25; 75:12</p> <p>entirely [6] - 14:5; 77:7; 88:8; 92:25; 93:7; 96:8</p> <p>entitled [3] - 20:13; 77:1; 115:14</p> <p>environments [1] - 88:6</p> <p>Equal [3] - 7:16; 8:25; 114:14</p> <p>equal [4] - 20:20; 22:9; 40:8; 61:15</p> <p>equally [2] - 15:7; 80:20</p> <p>equals [1] - 35:6</p> <p>equipped [2] - 85:20; 110:9</p> <p>equitable [1] - 115:1</p> <p>equities [5] - 11:14; 12:3; 31:4, 24; 44:25</p> <p>ergo [1] - 107:19</p> <p>erroneously [2] - 45:1</p> <p>especially [2] - 20:3; 64:25</p> <p>essential [1] - 15:2</p> <p>essentially [20] - 7:14, 25; 8:23; 10:15; 11:4; 30:5, 23; 31:19; 39:11; 43:1; 45:12; 56:16; 57:2; 59:11; 64:1; 66:4; 75:1; 76:11; 119:7</p> <p>establish [1] - 40:9</p> <p>established [2] - 14:2; 17:19</p> <p>establishing [1] - 26:24</p> <p>establishment [1] - 85:19</p> <p>et [3] - 52:22; 116:2</p>	<p>ethic [1] - 92:24</p> <p>ethnic [2] - 6:16; 93:12</p> <p>ethnicity [1] - 78:25</p> <p>evaluate [1] - 106:2</p> <p>evaluated [1] - 105:23</p> <p>evaluating [1] - 37:1</p> <p>evaluation [2] - 28:2</p> <p>evaluations [1] - 13:21</p> <p>event [1] - 108:21</p> <p>eventually [1] - 23:24</p> <p>ever-moving [1] - 49:16</p> <p>evidence [12] - 60:14; 65:11, 20; 66:9, 21; 68:9, 12; 79:10; 88:9; 91:20; 104:6</p> <p>evidentiary [2] - 44:4; 104:9</p> <p>exact [5] - 20:15; 32:24; 50:4; 63:22; 99:19</p> <p>exactly [14] - 6:5; 45:15; 49:19; 66:10, 25; 67:22; 73:1; 74:2; 78:4; 82:13; 83:25; 96:10; 103:24; 111:6</p> <p>exaggerated [2] - 58:8</p> <p>exam [2] - 17:18</p> <p>examination [1] - 25:6</p> <p>example [11] - 17:3; 21:8; 27:23; 28:11; 40:13; 77:18; 88:17; 90:5; 99:5; 107:3; 122:13</p> <p>exams [1] - 27:5</p> <p>exasperated [1] - 57:8</p> <p>excellent [2] - 20:7; 105:2</p> <p>except [1] - 47:15</p> <p>exception [2] - 101:10; 105:15</p> <p>exchange [1] -</p>
---	---	--	---	---	--

Preliminary Injunction Hearing 12/14/23

112:23 exchanged [1] - 19:9 excluded [2] - 7:2; 32:24 exclusions [1] - 52:24 Executive [2] - 71:1; 85:22 exercise [2] - 30:18; 113:24 Exhibit [3] - 68:12; 87:13; 92:14 exhibits [2] - 34:7; 104:7 exist [1] - 43:13 existed [1] - 61:16 existence [2] - 20:23; 38:14 existing [2] - 43:11 exists [2] - 61:16; 66:21 expect [2] - 120:15 expectation [1] - 94:18 experience [7] - 50:7; 55:14; 63:9; 74:24; 79:22; 92:9; 97:1 experiences [1] - 81:5 experiment [2] - 75:2, 5 expert [9] - 52:3, 19; 63:8; 67:5; 69:17; 77:8, 23; 78:4; 96:25 experts [10] - 52:21, 23; 53:10; 63:7; 67:16; 69:16; 77:7; 92:17; 103:1; 122:13 expiration [1] - 36:24 explain [6] - 40:3; 52:16; 57:21; 78:9; 86:14, 25 explained [10] - 18:25; 25:19; 76:20; 82:7, 11; 85:20; 92:15; 94:17; 95:19; 122:20 explains [7] - 79:11, 23;	80:21; 87:3; 89:11; 90:15; 91:18 explanation [1] - 116:11 explicit [1] - 53:15 explicitly [1] - 82:23 explore [3] - 26:2; 58:3; 103:18 explored [1] - 102:4 expounded [1] - 115:4 express [1] - 91:22 expressly [3] - 9:14; 75:19; 90:15 extended [3] - 81:12; 82:15 extending [1] - 82:8 extensive [2] - 92:14; 104:9 extent [11] - 33:14; 38:21; 55:12; 58:9; 59:8; 61:12; 71:10; 102:4; 115:12; 118:21 extra [2] - 5:23; 35:6 extraordinary [11] - 11:9; 30:14, 18; 32:4; 40:2; 46:9; 55:7; 58:12; 61:6; 113:24 extremely [3] - 13:7; 32:7; 69:23 extremes [1] - 70:22 eyes [4] - 33:15; 44:5; 48:23; 51:14	56:10; 59:21; 65:25; 66:1; 82:13; 83:10; 87:16; 98:11; 106:11; 107:3; 108:18; 109:15; 112:4, 8 factor [14] - 9:3; 36:16; 65:19; 68:24; 76:18; 78:17; 81:7; 82:21; 83:6; 103:21; 105:10; 107:10; 119:8 factors [15] - 34:13, 16; 35:9; 46:13; 64:16; 68:22; 79:1, 20-21, 23; 81:6; 83:4 facts [21] - 13:18; 58:2; 66:6; 70:4; 71:12; 73:17, 21; 78:6; 90:22; 99:23, 25; 105:22; 106:21; 107:13; 110:10; 121:24; 122:12 factual [21] - 82:19; 101:19; 104:13; 105:16; 106:3, 7, 9; 107:24; 108:10; 109:17; 110:8, 11, 15-16; 111:25; 114:18; 115:20; 116:9, 11; 123:11 factually [3] - 101:1; 104:15, 17 fail [2] - 67:10; 101:25 failed [6] - 13:12; 49:19; 67:8; 89:18; 94:10; 97:1 failing [1] - 122:1 failure [2] - 23:6; 103:20 Fair [6] - 2:4, 18; 3:6; 6:14, 22; 114:9 fair [1] - 24:3 fairness [1] - 38:15 faith [1] - 90:1 fall [3] - 34:16; 79:7; 102:22 far [10] - 29:14;	30:19; 36:7; 59:12; 61:19; 70:19; 83:17; 100:23; 113:25; 114:11 far-reaching [2] - 30:19; 113:25 farthest [1] - 11:21 fashion [1] - 12:20 fast [2] - 44:6; 108:15 faster [1] - 20:3 favor [2] - 45:5; 79:1 favorably [1] - 87:21 favors [2] - 11:14; 31:4 feasible [1] - 90:2 feature [2] - 76:24; 83:8 February [8] - 35:22, 24; 81:24; 82:1; 104:4; 109:6; 116:3; 119:9 Federal [1] - 40:24 federal [3] - 10:10; 47:22; 48:1 feds [1] - 47:25 feedback [1] - 87:25 fell [1] - 9:6 Fellows [1] - 6:23 few [6] - 45:16; 71:10; 84:14; 89:21; 119:1; 123:17 Fifth [4] - 7:16; 34:16; 95:12; 114:14 fighting [3] - 72:8, 12; 95:6 figure [4] - 58:16; 60:4; 64:19; 101:7 figured [1] - 108:11 file [3] - 79:3; 110:20; 119:5 filed [20] - 5:9; 6:13; 7:18, 21-22; 8:9, 17; 15:16, 18; 21:22; 29:15; 34:6; 38:11;	39:5; 56:11, 13; 77:15; 119:5 fills [1] - 96:10 final [3] - 42:1, 5; 66:13 finally [5] - 10:4, 8; 11:14; 78:6; 81:21 findings [3] - 106:3; 111:25; 115:20 fine [9] - 13:1; 71:24; 72:25; 111:14, 21; 112:21; 115:18; 121:22; 122:15 finish [3] - 45:22; 55:2; 62:1 finished [1] - 117:25 firm [1] - 3:16 first [20] - 2:17; 6:24; 12:18; 13:5; 19:1; 31:19, 21; 43:16; 47:5; 50:2; 72:1; 75:9, 18; 78:16; 89:23; 90:3; 97:12; 99:4; 100:6; 113:12 First [3] - 13:22; 19:5; 38:6 Fisher [3] - 19:18; 100:18; 101:3 fit [3] - 56:4; 58:3, 12 fits [3] - 55:23; 103:11; 107:19 fitting [1] - 103:16 five [13] - 10:4; 20:2, 6; 40:14; 44:22; 46:22, 24; 73:20; 74:5; 100:12; 106:17; 107:16; 121:9 five-year [1] - 74:5 five-year-old [1] - 40:14 flag [11] - 57:22; 59:17; 62:2; 67:12; 72:16; 84:15; 106:23; 120:16, 21; 122:9 flat [2] - 110:20; 111:18 flawed [2] - 72:1, 5	flier [1] - 109:20 flip [1] - 103:7 Florida [1] - 53:2 focus [5] - 58:11; 75:11; 84:16; 86:19; 88:1 focused [4] - 8:1; 84:17; 102:10; 104:14 follow [9] - 29:17; 30:24; 35:10; 50:17; 61:11; 65:5; 69:11; 105:1; 122:20 following [2] - 26:5; 45:23 folly [1] - 99:2 footing [4] - 20:20; 22:9; 38:22; 40:8 footnote [6] - 6:25; 7:8; 9:13; 47:15; 98:15; 107:20 Footnote [7] - 7:2; 9:14; 36:21; 38:20; 59:4; 98:14, 25 footnotes [1] - 99:1 force [7] - 56:22; 57:2, 4; 69:10; 72:9; 75:1; 95:6 forces [1] - 74:20 foreclosed [3] - 40:12, 23; 41:3 foreign [1] - 70:12 forever [5] - 23:23; 40:12, 16, 22; 41:3 forgetting [1] - 67:1 forgo [1] - 75:3 form [2] - 35:2; 112:18 formations [1] - 63:13 formed [1] - 11:1 former [1] - 77:18 forth [4] - 30:24; 115:3; 122:19, 22 forward [6] - 27:20; 29:9; 60:13; 114:25 foster [2] - 74:21; 92:5 Foulke [1] - 40:13 four [12] - 10:3; 11:10; 31:1, 5,
---	--	--	--	--	--

F

F.2d [1] - 114:3
F.3d [2] - 114:2, 7
facing [1] - 57:3
fact [28] - 2:12; 8:8; 10:17; 13:16; 17:6; 18:19; 25:13, 21; 27:13; 31:11; 38:19, 24; 39:23;

Preliminary Injunction Hearing 12/14/23

8; 34:12; 44:13; 83:4; 90:6, 19 Fourteenth [1] - 9:1 fourth [1] - 49:21 Fourth [31] - 19:3, 5; 20:14; 30:20; 31:9; 106:11; 107:17; 108:25; 109:9, 13, 19, 21; 110:8, 13, 25; 111:8, 13, 19, 24; 112:1, 7, 19; 114:1, 6-7; 115:13, 17, 19; 123:4 framing [1] - 121:18 frankly [3] - 29:10; 56:8; 86:5 Fred [2] - 4:13; 7:11 free [4] - 57:20; 58:2; 112:19 freedom [1] - 37:10 freshman [3] - 41:17; 42:17; 44:19 friend [3] - 27:13; 43:8; 100:24 friend's [2] - 18:19; 98:4 friends [4] - 43:19; 104:7; 118:23 frightens [1] - 19:23 front [2] - 72:14; 107:17 frozen [1] - 115:19 fruit [1] - 29:10 frustrated [1] - 10:24 full [3] - 91:8; 105:25; 116:13 Fuller [2] - 67:14 fully [13] - 2:10, 23; 4:20, 24; 5:4, 7, 21; 8:5, 18; 22:15; 32:3; 86:6; 122:23 function [1] - 115:7 Fund [1] - 5:13 fundamental [2] - 18:5; 57:9 fundamentally [3]	- 42:1; 72:5; 95:16 future [7] - 25:21; 26:21; 40:7; 73:7, 24-25; 84:3 G Gabriel [1] - 3:2 game [1] - 29:1 GAO [1] - 65:15 gaps [1] - 69:1 GARDNER [67] - 4:17, 21; 5:15; 12:17; 13:5, 11; 14:5, 12, 19, 25; 15:17, 19; 16:8, 12, 14; 17:4; 23:18; 24:6, 17, 21; 25:2, 11; 26:6, 10, 17; 27:17, 22; 28:15; 29:11; 37:19; 38:12, 24; 39:1, 8; 41:16, 20; 46:17; 71:18, 21, 25; 72:22; 73:5, 23; 74:8; 76:19; 77:22; 78:14, 21; 80:2, 5, 13; 83:25; 84:19; 85:8, 12, 15; 86:6, 22; 91:13; 94:1, 14; 120:14; 121:3, 10, 14; 122:3, 11 Gardner [33] - 4:18; 11:18, 22; 12:16, 21; 13:4; 15:14; 18:10; 23:16; 27:21; 29:1, 12; 31:22; 37:17; 38:15; 42:8; 44:7; 46:11, 16; 61:9; 71:15; 72:19; 73:15; 76:10; 84:2; 86:5; 94:7; 97:6; 117:14; 119:18; 120:9 GARGEYA [1] - 5:6 Gargeya [3] - 5:7; 11:23; 119:20 gender [1] - 78:25 general [10] - 35:21; 36:13;	49:15; 56:14; 76:20; 81:24; 93:5; 96:3 General [5] - 63:9; 67:5, 8, 23; 77:18 General's [4] - 39:21; 96:6; 101:13, 17 generally [4] - 11:19; 23:7; 25:23; 80:2 generational [1] - 68:25 gentleman [1] - 38:9 Georgia [1] - 40:25 germaneness [2] - 15:21 gerrymandering [1] - 38:2 gist [1] - 97:21 given [11] - 20:3; 25:22; 38:19; 54:24; 56:22; 74:11; 80:3, 5; 93:3; 99:5; 104:3 glad [9] - 12:21, 23; 18:11; 31:18; 32:1; 37:17; 46:9, 21; 97:7 goal [7] - 48:4; 49:2; 62:22; 67:22; 93:4; 120:20; 122:1 goals [6] - 48:11; 53:19, 23; 93:9, 14 Goldman [7] - 77:6, 9; 78:4; 83:21; 85:1; 98:7 good-faith [1] - 90:1 governed [1] - 10:10 government [2] - 47:23; 48:1 Government [23] - 11:6; 13:17; 34:21; 35:15; 42:6; 46:1; 48:6; 57:20; 58:4; 60:22; 62:7; 70:9, 25; 75:9; 77:16; 92:24; 98:12; 99:2;	108:14 Government's [7] - 35:13; 42:4; 86:15; 99:9; 100:1; 107:6; 120:22 grades [1] - 81:4 graduate [3] - 9:23; 65:6; 73:8 graduated [1] - 41:18 graduates [5] - 61:23; 72:11, 16; 73:3, 6 graduating [1] - 10:2 grant [6] - 34:25; 108:23; 109:22, 24; 112:17, 20 granted [5] - 30:17, 19; 45:2; 113:25; 115:16 granting [2] - 109:12; 111:24 grants [1] - 111:8 Gratz [5] - 21:1; 22:7, 9, 12; 101:15 gravamen [2] - 9:19; 11:17 gravest [1] - 98:17 great [3] - 103:13, 15; 112:3 greater [1] - 103:8 grossly [1] - 101:14 grounds [1] - 31:12 groundwork [1] - 8:19 group [6] - 36:18; 48:20; 51:2; 67:2; 91:16 groups [4] - 48:15; 49:1; 87:3; 88:1 Grutter [13] - 9:2; 15:4, 8; 36:24; 43:11; 75:25; 76:2, 25; 90:11; 92:21; 94:17; 96:6; 100:17 Guard [6] - 52:11, 13; 54:7; 96:13, 15 guess [9] - 6:24; 10:19; 32:16; 39:13; 59:2, 13; 78:3; 86:22	guidance [2] - 10:13; 78:22 guides [1] - 107:21 Guinea [1] - 75:6 H half [1] - 39:21 halls [1] - 88:1 Halpern [1] - 7:19 hand [1] - 27:25 handle [1] - 12:9 happy [3] - 3:8; 20:1; 86:13 harbor [3] - 70:15; 113:4 hard [7] - 8:15; 13:7; 35:2; 44:6; 82:25; 102:12; 111:23 hardest [1] - 47:1 hardships [1] - 45:5 harm [25] - 11:13; 12:3; 13:14; 20:24; 26:19; 31:4, 17, 21; 32:2; 34:23; 35:9, 17-18; 38:7; 40:1, 6, 10; 41:23; 42:25; 44:12, 14, 25; 45:2; 87:20; 104:4 harmed [1] - 35:15 harms [6] - 35:13, 15; 42:2; 65:2; 94:2 harness [1] - 67:18 Harvard [121] - 6:19, 23; 8:22, 24; 9:5; 15:4, 7, 15; 16:2; 19:12; 20:2, 25; 32:6; 33:7; 34:10; 36:21; 38:16; 39:9, 12, 19, 22-23; 43:10, 12, 15, 17; 46:7, 23; 47:5, 12, 14, 21; 48:2, 13; 49:8, 10, 13, 18, 21, 24; 50:2, 5, 11, 14; 51:4, 9, 19; 52:4; 55:23; 56:5, 18; 57:16; 58:4, 12; 60:7;	65:11; 66:17; 72:3; 75:14, 17, 19, 24-25; 76:7, 24-25; 77:15, 21; 78:8; 82:20; 83:13; 87:21; 90:4, 25; 91:3, 13; 92:20; 93:1, 10, 20, 23; 94:5, 8, 10, 22; 95:1; 97:14, 16, 22; 98:2, 15; 99:8, 20, 23; 100:4, 7; 101:4, 11, 13, 18; 103:10; 104:18; 105:23; 107:19; 112:3, 11; 116:14 Harvard's [1] - 83:2 hat [1] - 106:19 Haynie [1] - 89:11 Haynie's [1] - 87:5 heads [1] - 118:24 hear [21] - 12:2, 19, 21, 23; 13:3; 18:11; 31:18; 32:1; 37:18; 46:10, 21; 73:24; 74:23; 75:10; 95:18; 97:7; 117:4, 13; 118:6 heard [8] - 23:16; 42:9; 55:3; 76:7; 86:10; 88:1; 97:13; 104:23 hearing [10] - 6:11; 7:25; 8:11; 10:21; 24:19; 25:8; 29:21; 44:5; 56:9; 106:9 heavy [1] - 55:8 held [10] - 8:23; 9:2; 20:14; 30:8, 21; 32:23; 47:13; 77:9; 90:11 help [1] - 55:22 helpful [1] - 117:3 helps [2] - 106:19; 113:7 Herndon [2] - 5:23; 123:15 herself [1] - 10:18 hidden [1] - 50:8 high [7] - 23:22; 29:3; 40:18;
--	---	--	--	---	---

Preliminary Injunction Hearing 12/14/23

41:18; 63:5; 104:20; 119:14 high-profile [1] - 23:22 high-ranking [1] - 63:5 higher [4] - 63:15; 81:14, 18; 86:20 higher-ranking [1] - 63:15 higher-scoring [1] - 81:14 highlight [1] - 92:16 Highway [1] - 20:15 hinges [1] - 75:12 Hispanic [1] - 90:9 historically [1] - 77:25 history [11] - 57:18; 59:23; 70:10; 74:24; 92:8, 14, 17; 96:25; 98:18; 99:1; 123:2 hits [1] - 71:2 hitting [1] - 62:21 hold [3] - 3:3, 24; 90:25 holding [2] - 94:8; 98:13 holdings [2] - 94:9 Homeland [1] - 96:17 honor [1] - 5:22 Honor [120] - 2:22, 25; 3:23; 4:5, 17, 23; 5:2, 6, 15; 12:15, 17; 13:5, 18; 14:5, 19, 25; 15:20; 17:7; 18:12; 20:1; 21:16; 23:10, 18; 24:7; 25:12, 21; 26:6, 17; 29:11; 32:3, 15; 33:10, 25; 37:19, 24; 38:5, 24; 39:8, 16; 42:10, 15, 23; 44:4; 46:17, 22, 25; 47:4; 51:6; 54:11; 55:20; 56:1, 24; 57:6; 58:20; 60:11, 24; 64:24; 66:9; 71:18; 72:6, 15;	73:5; 74:8, 17; 75:18, 22; 76:19; 78:6; 79:4, 21; 80:2, 23; 81:11, 17; 83:18, 25; 84:19; 85:1, 3, 5, 15, 24; 86:23; 87:5, 21; 88:12; 89:1, 15; 91:11; 92:7, 11; 93:3, 13, 16; 94:1, 25; 96:5, 7, 23; 97:3, 9; 103:24; 104:11, 23; 105:2; 108:3; 110:17; 111:3, 16; 113:6, 14; 117:15; 118:8, 12; 119:16, 24; 120:8, 16, 21; 122:4 Honor's [3] - 43:7; 60:2; 118:11 hook [1] - 102:1 hope [4] - 20:3; 26:6; 105:6; 113:8 hostile [1] - 122:3 hot [4] - 10:18, 20; 71:19; 113:17 hour [1] - 3:11 hours [4] - 110:5; 116:2; 118:15; 119:6 house [1] - 108:19 Hrdlicka [1] - 85:2 human [1] - 48:25 I idea [5] - 52:10; 68:16; 121:8 identical [1] - 122:12 identified [3] - 13:24; 35:18; 75:18 identify [5] - 2:20; 4:15; 23:6, 10; 95:2 identity [3] - 13:25; 50:7, 10 ignores [2] - 90:22; 93:20 ignoring [1] - 112:4 Ill [3] - 19:4;	22:17, 19 illegal [6] - 36:20; 49:24; 50:2, 12; 51:5; 101:14 imagine [1] - 118:22 immediate [1] - 45:15 immediately [3] - 7:23; 31:15; 40:20 immunity [1] - 34:22 impact [1] - 88:22 imperative [1] - 114:18 impermissible [1] - 91:14 implications [3] - 45:19; 61:20; 62:9 imply [1] - 18:16 import [2] - 9:12; 45:11 importance [1] - 83:24 important [27] - 16:17; 33:15; 34:1; 53:11; 59:21; 60:1, 3; 64:22, 24; 67:12; 79:7, 12; 80:24; 81:11, 21; 86:15; 89:12; 93:2; 99:6, 8; 100:20; 103:11; 110:15; 113:19; 123:1, 5 importantly [1] - 98:14 imposition [1] - 40:4 impossible [4] - 35:17; 44:1; 48:10; 52:4 imprecise [1] - 92:19 in-state [1] - 101:6 inability [4] - 15:23; 20:19; 22:8 inappropriate [3] - 74:10; 77:7; 86:12 inclined [5] - 12:2; 29:2; 71:15, 21; 89:17 included [3] - 43:22; 77:17;	87:10 includes [4] - 39:6; 79:21; 81:3; 87:8 including [7] - 8:13; 35:12; 77:18; 85:19; 92:24; 95:9; 101:3 inclusive [1] - 48:3 incoherent [1] - 48:2 incoming [1] - 93:4 inconsistent [2] - 84:25; 96:8 incorrect [2] - 14:20; 15:11 increase [5] - 50:5; 65:24; 69:10; 88:16 increased [3] - 88:18, 20; 95:15 increases [1] - 69:8 increasingly [1] - 103:5 incredibly [2] - 16:17; 53:3 indecisiveness [1] - 110:21 indeed [2] - 63:17; 116:10 indefensible [1] - 53:24 indefinitely [1] - 89:25 indicate [4] - 5:23; 29:9; 103:3, 5 indicated [4] - 30:3; 102:10; 123:3 indicating [1] - 92:9 indication [1] - 5:25 indicia [1] - 74:1 individual [2] - 9:23; 48:25 individuality [1] - 67:2 individualized [1] - 49:23 individuals [3] - 51:3; 58:9; 64:1 indulgence [1] - 78:9 inferences [1] -	106:21 information [9] - 18:21, 23; 19:8, 12; 20:8, 13, 17; 90:7; 104:1 informed [1] - 76:1 inherently [2] - 90:24; 91:2 initial [2] - 17:8; 31:14 injunction [56] - 6:12; 7:17, 23; 8:5; 11:8, 14; 14:4, 11, 14, 18; 16:15; 19:6; 20:12; 24:20; 30:5, 7, 17, 23; 31:5, 7, 20; 34:13; 35:1; 36:12, 15; 38:6; 40:2, 5, 20; 41:3; 42:2; 43:19; 45:1; 55:7; 60:18; 61:6; 66:11; 74:9; 83:16; 86:3, 8; 97:5; 105:9; 108:21; 109:13, 16, 22; 111:5; 112:14, 17; 113:23; 120:2; 122:21 injunctions [5] - 11:9; 32:4; 36:8; 104:2; 114:4 injunctive [6] - 8:1; 9:20; 37:21; 38:3; 109:24; 111:9 injured [1] - 15:24 injuries [1] - 34:20 injury [13] - 17:21; 20:18; 25:25; 27:1; 34:18; 35:2; 37:12; 40:9; 43:3 input [1] - 119:19 inquire [1] - 2:14 inquiry [1] - 76:5 inside [1] - 67:7 instead [7] - 22:5; 49:7; 50:18, 24; 51:3; 90:22; 96:2 instincts [1] - 118:3 institution [5] - 59:23; 70:21;	72:2; 75:14; 83:11 institutions [3] - 6:21; 69:10; 77:3 insufficient [1] - 25:25 intend [1] - 89:25 intentionally [1] - 70:6 intentions [2] - 109:12; 111:24 interest [46] - 6:6; 11:15; 12:4; 30:15; 31:6, 24; 35:10, 13-14; 45:10; 49:14; 53:6; 60:6; 63:11; 68:2, 8; 69:4; 75:10, 23; 76:1; 79:22; 83:12, 24; 89:3, 7, 9, 16; 91:5; 92:2; 93:2, 21, 23; 94:4, 20-21; 97:17; 99:14, 19; 105:12; 106:4; 109:2, 8, 10; 111:1 interested [2] - 84:11; 122:7 interesting [6] - 59:14; 61:18; 62:12; 65:17; 84:8; 110:24 interests [23] - 7:4; 9:18; 33:1, 3, 6, 21; 48:12; 51:7; 52:1; 54:1; 66:16, 24; 75:21; 76:8; 88:25; 89:19; 93:22; 94:23; 100:19, 21-22; 114:20 interfere [1] - 85:18 interlocutory [3] - 109:12; 110:3; 115:16 intermediate [2] - 46:19; 86:21 internal [1] - 10:13 internally [1] - 72:18 international [3] - 51:14; 74:22; 89:13 Internet [1] - 6:18
--	---	---	---	---	---

Preliminary Injunction Hearing 12/14/23

internment [1] - 98:23	73:5; 75:17, 23; 76:9; 83:13;	judicial [9] - 2:12; 9:8; 29:25; 51:8; 84:9, 20, 23-24; 86:13	116:12	lawyers [4] - 10:22; 43:24; 61:10	79:4
interrupt [2] - 62:1; 64:21	84:8; 91:17; 93:11, 21; 94:2, 5; 95:16;	Judiciary [1] - 114:23	lacking [1] - 94:10	lay [1] - 8:18	letter [2] - 21:17, 19
Interruption [1] - 6:4	109:14; 115:22; 120:17	July [2] - 118:1; 119:11	lacks [1] - 89:16	lead [2] - 72:8; 86:15	Letters [6] - 36:2; 80:12, 15-17; 82:15
interviewed [1] - 28:9	issued [5] - 8:21; 42:6; 115:18, 23; 116:1	jumping [1] - 8:7	Lamone [1] - 37:25	leader [2] - 67:23	letters [3] - 21:16; 80:13, 17
interviewing [1] - 27:14	issues [11] - 38:23; 54:10; 89:21; 91:5; 106:7; 107:23; 108:9; 123:7	June [5] - 6:21; 8:20; 9:5; 39:5	land [1] - 64:18	leader's [2] - 67:18, 20	letting [1] - 99:15
intuition [2] - 13:6; 18:13	issuing [3] - 61:6; 74:9; 122:24	junior [4] - 28:19, 21; 40:18, 21	language [5] - 32:24; 39:14; 59:4; 94:7; 103:11	Leaders [3] - 31:10; 34:14; 35:12	level [6] - 24:4; 53:7; 59:14, 18; 68:22; 86:21
invents [1] - 50:13	itself [7] - 12:6; 25:24; 35:8; 47:23; 62:7; 87:21; 101:4	jurisprudence [1] - 14:23	languages [1] - 79:23	leaders [4] - 67:10; 74:13; 96:25	Liberties [2] - 5:11
inverse [1] - 11:22		Justice [20] - 4:18, 24; 5:3, 7; 9:9; 10:17; 32:25; 33:14; 38:19; 39:4; 56:17; 59:4, 22; 61:10; 94:7, 16; 101:6; 103:12; 107:20; 114:21	large [6] - 21:23; 51:2; 67:16; 73:14; 76:14; 98:1	leadership [4] - 50:19; 67:10; 74:3; 81:5	life [1] - 79:21
investment [1] - 88:13	J	Justice's [2] - 59:1; 99:1	last [13] - 19:1; 25:20; 41:9; 51:7; 59:24; 65:8; 66:15; 69:19; 103:24; 105:17; 106:18; 112:6; 122:1	leading [3] - 55:24; 56:2; 58:9	light [5] - 2:12; 9:17; 29:15; 46:6, 20
invitation [1] - 89:15	Jacksonville [1] - 20:25	justification [1] - 37:20	lastly [2] - 51:6; 69:3	learn [1] - 91:25	likelihood [15] - 12:5, 8, 11; 31:16; 37:7; 44:15; 45:8; 46:2, 5, 10; 60:19; 61:5; 64:17; 104:3
invited [1] - 91:15	January [12] - 17:10; 25:23; 26:4, 13, 16; 27:16, 24; 35:23; 70:9; 82:2, 6	justify [3] - 9:11; 89:6; 103:6	late [1] - 115:10	least [12] - 5:20; 14:8; 16:3; 23:8; 58:24; 65:2; 66:8; 75:16; 82:22; 83:7; 95:21; 106:18	likely [25] - 11:12; 20:9; 22:16; 31:2; 32:6; 34:15; 35:16; 41:21; 46:4; 50:17, 20, 22; 61:1; 65:23; 66:11; 67:2; 68:13; 83:14; 105:4; 109:16
involved [1] - 41:1	Japanese [1] - 98:23	K	latitude [1] - 105:15	leave [2] - 68:15; 74:6	limit [1] - 41:22
Involved [2] - 64:25; 101:24	Jeon [1] - 5:18	Kacher [2] - 4:13; 7:12	Latta [10] - 4:11; 7:11; 36:2; 79:10, 23; 80:21; 82:11; 90:15; 91:18; 95:13	led [1] - 6:20	limitations [1] - 121:21
involves [1] - 30:18	job [3] - 60:4; 65:9	keep [1] - 99:14	Latta's [5] - 78:17; 81:10; 82:7; 95:19, 22	left [2] - 21:20; 68:11	limited [8] - 30:20; 32:14; 36:17; 66:12; 74:14; 75:7; 90:16; 114:1
involving [1] - 113:24	Johnson [6] - 69:9; 93:23; 94:25; 98:9, 13	keeping [1] - 123:16	laughing [8] - 8:16; 11:22, 25; 43:25; 44:9; 113:3, 11; 115:9	Legal [1] - 5:12	limits [1] - 86:3
IPEDS [1] - 47:24	join [3] - 50:24; 68:5, 10	key [4] - 34:12, 22; 76:24; 81:2	laughter [1] - 44:3	legal [14] - 17:24; 23:12; 39:16; 43:13; 60:25; 104:14, 16-17, 19; 106:14; 107:18, 24; 108:9; 110:25	line [9] - 3:10; 4:3; 6:6, 9; 41:11; 59:10; 81:17; 107:16; 122:1
irrational [1] - 48:3	joined [1] - 68:10	kicker [1] - 80:10	Laughter [4] - 19:21; 71:17; 121:13; 122:2	legitimacy [7] - 65:23; 69:8, 10; 74:22; 89:10, 13; 92:10	lined [1] - 116:22
irrelevant [2] - 19:4; 39:10	Josh [1] - 4:17	kind [5] - 28:7; 42:21; 48:24; 49:1; 105:19	law [15] - 3:15; 15:9; 21:2; 24:10; 25:9; 29:6, 18; 43:11; 51:15; 87:10; 100:18; 101:3; 111:22; 112:11; 115:7	legitimate [5] - 51:14; 69:5, 23; 109:14; 114:22	lines [1] - 72:14
irreparable [24] - 11:13; 12:3; 26:19; 31:4, 17, 21; 32:1; 34:17, 23; 35:2, 4, 9; 37:12; 38:7; 40:1, 5, 9-10; 41:23; 42:25; 43:3; 44:12, 14; 104:4	Judge [1] - 7:19	kinds [2] - 25:10; 116:7	lawful [2] - 15:5, 8	length [1] - 43:5	list [1] - 68:12
Island [1] - 23:4	judge [7] - 2:9; 10:19, 24; 33:16; 111:11; 112:8; 116:22	known [4] - 10:1; 69:21; 103:12	lawsuit [6] - 8:22; 15:8, 22; 38:11; 39:5, 25	less [8] - 70:8, 21; 79:14; 87:3; 88:6	listed [10] - 3:4, 10-11, 19, 25; 7:12; 8:15; 112:24
Islander [1] - 64:7	judges [2] - 105:14	knows [3] - 54:23; 85:3; 109:23	lawsuits [1] - 6:18	lessened [1] - 102:15	listen [3] - 6:7, 10
Islanders [3] - 73:18; 76:17	judgment [16] - 18:7; 29:25; 30:9; 42:1, 5; 74:14, 18, 22; 75:7; 77:1, 5, 8, 10; 83:23; 86:16; 96:25	Korematsu [3] - 98:16, 20; 99:3	lawyer [2] - 44:1; 121:7	lethal [4] - 51:12; 69:23; 72:8; 95:5	listening [2] - 32:21; 61:4
Israel [1] - 114:3	judgments [3] - 78:3; 85:21, 24	Kumar [1] - 5:18		lethality [1] - 87:8	listing [2] - 6:18;
issue [44] - 7:23; 9:17; 11:16; 12:1; 13:12; 15:21; 16:15; 22:21; 23:5; 24:7, 10; 26:12; 29:14; 30:3, 22-23; 31:7, 14; 33:2; 38:8, 20; 41:2; 45:25; 55:7; 56:3; 58:4; 60:18; 61:7;	Judicial [1] - 71:2	L		Letter [2] - 21:8;	
		Labor [1] - 118:5			
		lack [6] - 13:14; 23:6; 42:21; 70:17; 88:6;			

Preliminary Injunction Hearing 12/14/23

107:5 literally [1] - 17:24 litigants [1] - 113:20 litigated [1] - 19:5 litigating [1] - 39:22 litigation [7] - 7:6; 19:18; 20:2; 23:8; 26:15; 45:4; 59:7 Lloyd [2] - 4:9; 7:10 LOA [3] - 79:5, 8; 80:19 LOAs [4] - 80:10, 12, 20; 82:11 local [1] - 6:9 logical [6] - 49:5, 12; 56:18, 20; 94:11 Longmore [1] - 123:16 look [26] - 17:24; 28:3; 29:19; 35:19; 48:16; 50:23; 51:22, 24; 60:8; 62:18; 65:8; 68:5; 74:2; 84:11; 87:1, 5, 12, 16, 24; 88:12; 96:21; 105:19; 107:22; 110:10; 120:10 looked [4] - 56:11; 63:10; 88:13; 107:10 looking [6] - 44:8; 51:3; 76:12, 15, 20 loosely [1] - 48:7 LOP [1] - 83:3 lose [7] - 22:21; 32:7; 34:24; 60:1; 104:12 loses [2] - 105:3, 7 loss [2] - 37:10; 71:5 lost [3] - 40:7, 20; 106:1 loud [1] - 54:6 low [1] - 68:23 lower [7] - 21:9, 18; 22:3; 59:19; 68:21; 69:14; 81:18 lower-scoring [1] - 81:18	Lyll [2] - 92:12; 96:24 Lyll's [1] - 87:2 M macro [4] - 68:18, 22; 69:12, 19 mail [4] - 3:9; 120:3; 122:15, 17 main [3] - 45:25; 82:24; 84:21 maintaining [1] - 95:5 major [1] - 84:16 majority [2] - 9:9; 36:15 makeup [5] - 49:14; 50:23; 63:2; 67:10 mandates [1] - 93:20 mandatory [6] - 40:2; 74:9; 83:7, 15; 86:8; 114:4 March [1] - 119:9 Marine [5] - 9:22; 10:6; 72:10; 92:1; 96:9 Marines [7] - 62:25; 64:3; 96:3, 12, 14, 17 marks [1] - 119:3 married [3] - 120:24; 121:1, 7 Maryland [2] - 5:12; 105:21 mask [1] - 5:21 masking [1] - 2:6 masks [2] - 2:7; 5:24 Massachusetts [2] - 14:18; 30:11 match [1] - 59:18 materialize [1] - 53:13 matter [37] - 6:6; 8:8; 24:16; 25:7; 27:12; 29:22, 25; 31:16, 21; 33:21; 39:3; 44:18; 45:16, 22; 46:15; 58:19; 59:11; 61:17; 70:17; 71:5; 76:11; 84:9, 15; 91:1; 101:20; 107:11;	108:18; 110:5; 112:11; 113:16; 114:19, 23; 116:14; 117:16; 122:21 matters [9] - 12:10; 29:22; 45:12; 56:20; 67:18; 82:20; 93:13; 105:16; 110:8 McCarthy [10] - 3:16, 23-24; 11:18; 12:13; 44:7; 116:16; 117:10; 120:7, 11 MCCARTHY [8] - 3:23; 117:15; 118:8, 22; 119:16, 24; 120:5, 8 mean [24] - 23:23; 25:3; 28:24; 33:19; 42:25; 43:23; 54:20, 22; 55:19; 57:19; 61:25; 72:23; 73:20; 77:4; 100:5; 113:10, 17; 117:17; 121:10, 14, 24 meaning [1] - 29:19 meaningful [1] - 63:2 meaningfully [1] - 51:8 meaningless [1] - 15:1 means [23] - 11:22; 32:8; 37:1; 47:12; 48:12; 49:17; 51:17, 21; 59:4; 60:17; 62:3; 64:14; 67:19; 68:19; 69:25; 77:5; 93:14; 101:9, 25; 121:7 meant [3] - 55:20; 70:5; 91:3 measurability [2] - 51:9; 66:16 measurable [7] - 9:7; 60:6; 66:17; 86:24; 87:19, 23; 89:19 measure [11] -	12:5; 48:10; 51:10; 53:6, 22; 54:2; 58:24; 60:6; 65:9; 88:8; 89:15 measured [3] - 39:8; 87:20; 88:15 measurement [1] - 39:10 measures [1] - 87:2 measuring [2] - 52:5; 119:2 mechanistically [2] - 72:3; 75:15 Medha [1] - 5:6 medical [4] - 13:21; 17:18; 27:4; 28:2 medically [1] - 17:17 meet [8] - 13:12; 18:9; 20:20; 26:21; 74:5, 15; 89:18; 101:23 meeting [1] - 48:21 Member [9] - 15:24; 29:16; 41:13, 17; 42:13, 16; 44:17 member [2] - 23:6; 28:9 Members [3] - 13:11; 40:7; 113:20 members [20] - 13:25; 16:3; 18:20; 19:7, 10; 20:5; 22:9, 13, 23; 28:17; 30:15; 32:20; 36:14; 51:2; 72:12; 75:6; 87:25; 92:6; 108:5; 109:21 memorandum [1] - 61:22 men [1] - 84:4 MENDEZ [3] - 5:2; 121:5, 8 Mendez [4] - 5:3; 119:20; 121:1, 4 mentioned [4] - 31:2; 84:14; 90:6; 92:11 mentors [1] - 50:21 Merchant [5] -	96:3, 9, 12, 14, 17 merely [2] - 30:7; 32:13 merge [1] - 35:13 merit [2] - 68:15; 112:12 meritocracy [1] - 68:14 merits [26] - 8:3; 11:12; 12:5, 9, 12; 30:8; 31:3, 16; 32:15; 34:12; 37:7; 40:1; 44:15; 45:9; 46:3, 5, 11; 57:9; 60:19; 61:5; 62:10; 64:18; 66:13; 83:14; 109:16 met [2] - 13:19; 25:16 method [2] - 22:1, 3 metrics [3] - 48:22; 53:21 MicroStrategy [1] - 114:2 middle [3] - 35:19; 82:6; 115:11 Middle [3] - 14:17; 30:11 midshipman [2] - 41:14; 42:14 midshipmen [4] - 59:9; 84:5; 88:20; 91:25 might [5] - 57:20; 87:20; 112:7; 117:6; 118:10 Military [4] - 5:10; 7:7; 10:7; 57:18 military [89] - 7:2, 4; 9:16, 18; 30:1; 32:23; 33:1; 38:20, 22; 43:14; 45:17, 20; 47:17; 48:5, 8; 50:24; 51:11; 52:24; 54:10; 55:13; 58:13, 17, 19; 60:5; 61:16; 67:7, 18; 68:11, 14; 69:1, 5, 13, 16, 21; 70:8, 19, 25; 71:5; 72:17; 73:14, 20; 74:4, 13, 18, 22; 75:2,	6; 77:11, 17, 25; 78:3; 83:11, 23-24; 84:9; 85:19, 21, 23-24; 86:12; 87:10; 89:12; 92:9, 15; 93:21, 24; 94:12; 97:17; 98:3, 6, 16, 18; 99:3, 10, 13; 100:14; 102:5, 13-14, 19; 103:17; 107:23; 114:20 military's [10] - 67:7; 76:25; 77:5, 10; 85:18; 89:7, 16; 93:14; 94:21; 96:25 mind [1] - 23:19 mine [1] - 27:13 mini [1] - 117:1 minimal [1] - 43:3 minimum [7] - 13:20; 49:25; 53:7; 62:16; 66:19; 74:5; 83:15 minus [1] - 101:10 minorities [13] - 21:25; 50:1, 15, 17, 20, 22; 51:13; 52:15; 63:1; 68:3; 102:16; 107:9 minority [12] - 21:10; 22:4; 48:15, 18-19; 73:18; 76:12; 81:13; 89:3; 90:14; 106:25 minute [5] - 4:7; 6:2; 55:12; 63:19; 111:10 minutes [1] - 45:16 mischaracterizations [1] - 78:10 mischaracterizes [1] - 79:4 mismatch [1] - 93:14 misreading [1] - 90:25 miss [1] - 42:24 mission [5] - 6:16; 67:22; 74:16; 88:14; 96:2
--	---	---	---	---	---

Preliminary Injunction Hearing 12/14/23

missions [2] - 15:22; 63:13 misspoke [1] - 58:20 mistaken [2] - 24:2; 83:22 mistakes [1] - 98:17 misunderstand [1] - 20:18 misunderstands [1] - 88:3 mix [1] - 50:16 model [1] - 68:4 models [1] - 89:3 modifications [1] - 115:25 Monday [5] - 120:4, 6; 122:16 month [1] - 82:4 months [9] - 19:25; 43:9; 106:2; 107:16; 109:4, 9; 110:25; 115:21; 117:9 moot [1] - 42:24 morale [1] - 88:7 most [13] - 11:20; 35:23; 43:9; 65:18; 69:20; 82:5; 98:8; 99:10; 100:1; 114:22; 118:3 mostly [1] - 32:15 Motion [1] - 29:5 motion [15] - 6:12; 7:17, 22; 8:4, 17; 20:12; 24:19; 81:22; 86:2; 97:4; 104:1, 14; 108:22; 112:13; 122:21 motions [5] - 6:11; 116:4; 117:19; 119:10 Motorola [1] - 114:2 Mountain [1] - 114:7 movant [1] - 46:4 move [16] - 11:3; 27:19-21; 29:9; 89:20; 105:3, 8, 12-13; 106:15; 108:21; 114:25; 117:12; 118:6 moved [2] - 39:4; 118:21	movement [1] - 36:6 moving [10] - 8:8; 11:11, 14; 31:2, 5; 49:16; 106:14; 113:22; 119:7 MR [154] - 2:22, 25; 3:2, 8, 14, 17, 21, 23; 4:5, 17, 21; 5:2, 15; 12:15, 17; 13:5, 11; 14:5, 12, 19, 25; 15:17, 19; 16:8, 12, 14; 17:4; 18:12, 17; 19:17, 22; 20:1, 7; 21:15; 22:25; 23:10, 15, 18; 24:6, 17, 21, 25; 25:2, 11; 26:6, 10, 17; 27:17, 22; 28:15; 29:11; 32:3; 33:9, 12, 24; 34:3; 37:8, 14, 16, 19; 38:12, 24; 39:1, 8; 41:16, 20; 42:10, 15, 18, 23; 43:4, 7; 44:4, 11; 46:17, 22; 47:4; 54:11, 17; 55:1, 19; 56:1, 24; 57:6; 58:20; 59:22; 60:24; 61:24; 62:12; 64:24; 66:7; 71:9, 18, 21, 25; 72:22; 73:5, 23; 74:8; 76:19; 77:22; 78:14, 21; 80:2, 5, 13; 83:25; 84:19; 85:8, 12, 15; 86:6, 22; 91:13; 94:1, 14; 97:9, 12; 98:22, 24; 99:25; 100:5, 8, 12; 103:23; 105:2, 6; 108:3, 8, 13, 19, 24; 110:17; 111:3, 7, 16; 113:6, 9, 14; 117:15; 118:8, 22; 119:16, 24; 120:5, 8, 14; 121:3, 5, 8, 10, 14; 122:3, 11 MS [2] - 4:23; 5:6	multiple [2] - 75:18; 79:22 Multiple [3] - 79:7; 81:15; 82:24 Multiples [1] - 79:12 multitude [1] - 80:11 must [10] - 9:23; 30:23; 31:20; 53:25; 56:14; 58:14; 76:3; 77:10; 82:2 mutually [1] - 84:25	36:5, 9-10; 39:18; 41:14; 50:13, 16, 23; 53:8; 54:4, 13; 57:10, 22-24; 59:9; 60:3, 11; 61:20, 22-23; 62:4, 8, 15, 20, 24; 63:18, 24; 65:6, 19; 72:1, 4, 7, 9-11, 15-16; 73:2, 6-7, 13, 25; 74:12, 14; 75:13, 15-16, 19; 77:25; 78:6, 11, 16, 23; 81:23; 82:8, 15, 25; 84:5, 18; 85:11; 88:19; 89:23; 90:19; 91:21, 24; 92:3, 19, 23; 93:3, 8; 95:8, 20, 25; 96:11, 13, 21; 97:14, 24; 100:7; 101:21; 105:10; 106:24; 109:11; 113:1, 21; 114:13; 122:5, 8 Navy [41] - 4:11; 9:22; 10:12; 20:21; 21:9; 22:17; 46:24; 47:5, 7, 10, 20; 49:5, 21; 50:22; 51:10, 19; 52:6, 25; 53:24; 54:4; 57:3; 62:17, 23, 25; 63:10; 64:2, 4, 6; 65:4, 23; 68:3, 20; 69:21; 76:12, 20; 87:17; 88:17; 92:1; 102:5; 122:1 Navy's [6] - 48:13; 51:7; 87:12; 88:12; 92:13; 96:24 necessarily [7] - 14:9; 16:25; 47:6; 55:24; 66:3; 76:1; 111:5 necessary [9] - 13:18; 51:20; 62:16; 66:19; 74:15, 19; 79:15; 94:19;	120:12 necessity [1] - 116:9 need [28] - 3:7, 12, 20; 5:25; 16:19; 18:21, 23; 21:10; 22:11, 18; 25:22; 30:1; 36:11; 52:17; 55:9; 65:2; 78:9, 14; 83:17, 19; 86:2; 91:4; 104:20; 106:7; 109:2; 116:10; 121:18 needed [1] - 5:13 needing [1] - 109:5 needs [3] - 18:25; 24:11; 53:9 negative [12] - 47:5, 13; 87:15; 89:24; 90:3, 12; 91:2, 8; 97:19; 104:15 negotiate [1] - 108:15 nerve [1] - 123:10 nervous [1] - 29:18 neutral [13] - 21:5, 7; 22:6; 47:11; 51:23; 52:9, 14; 54:8; 95:17, 21, 25; 100:5, 13 neutrality [2] - 32:12; 69:11 never [8] - 16:4, 8; 48:4; 58:8; 68:20; 69:14; 95:1; 100:20 nevertheless [1] - 92:3 new [1] - 50:13 New [3] - 7:7, 18; 40:14 next [6] - 26:14; 31:15; 80:25; 105:1; 115:12; 118:5 nice [11] - 3:1, 4, 18; 4:1, 4, 19; 5:1, 5, 8, 17, 19 nine [4] - 105:18; 106:18; 112:5, 9 Ninth [1] - 105:18 nobody [2] - 34:6; 53:6 nomination [20] -	13:21; 16:24; 17:2, 5, 10, 17; 18:3; 22:16; 25:18, 20, 22; 27:4, 12, 19, 24; 28:10; 29:8; 79:25 nominations [9] - 27:15; 28:22; 80:3, 7; 81:1; 82:3; 107:4, 7, 12 nominees [1] - 22:2 nondeterminative [3] - 79:2, 20; 91:2 nondiverse [3] - 48:22; 90:13 none [3] - 43:24; 90:2; 95:22 nonjury [2] - 30:9 nonminorities [1] - 50:2 nonminority [1] - 48:16 nonprofit [1] - 6:15 nonsense [1] - 71:3 nonstrategic [1] - 40:3 normal [1] - 42:5 normally [3] - 65:13; 116:7; 119:5 NORRIS [70] - 2:22, 25; 12:15; 18:12, 17; 19:17, 22; 20:1, 7; 21:15; 22:25; 23:10, 15; 24:25; 32:3; 33:9, 12, 24; 34:3; 37:8, 14, 16; 42:10, 15, 18, 23; 43:4, 7; 44:4, 11; 46:22; 47:4; 54:11, 17; 55:1, 19; 56:1, 24; 57:6; 58:20; 59:22; 60:24; 61:24; 62:12; 64:24; 66:7; 71:9; 97:9, 12; 98:22, 24; 99:25; 100:5, 8, 12; 103:23; 105:2, 6; 108:3, 8, 13, 19, 24;
--	--	--	---	--	---

Preliminary Injunction Hearing 12/14/23

110:17; 111:3; 7, 16; 113:6, 9, 14 Norris [38] - 2:22; 3:16; 11:24; 12:14, 23; 18:11, 16; 19:16; 22:20; 24:24; 31:19; 32:2, 19; 37:15; 42:9; 44:10; 45:7; 46:9, 21; 54:9, 19; 59:3; 64:20; 70:2; 71:8; 73:16; 86:18; 97:7; 102:2; 105:11; 110:22; 112:3; 113:13; 115:12; 117:24; 119:19; 123:3 North [12] - 6:19; 8:23, 25; 14:17; 30:12; 105:24; 112:5, 8; 116:15 note [22] - 5:9, 20; 6:2; 9:21; 11:4; 12:7; 15:15; 23:21; 29:7, 24; 45:10; 46:12; 56:6, 12; 59:12; 61:25; 96:14; 107:15; 112:8; 115:15; 121:22 Note [1] - 96:7 noted [18] - 3:8; 9:12; 38:25; 42:12; 45:7; 56:7, 13; 57:14; 63:24; 72:15; 74:17; 102:11; 107:4, 6; 113:23; 114:1, 6, 21 notes [2] - 42:12; 78:21 nothing [15] - 23:12; 25:12; 26:20, 25; 27:6; 34:20; 39:17, 24; 71:6; 82:8; 95:12; 111:11, 15 Notice [1] - 8:9 notice [1] - 19:19 noticed [1] - 44:7 noting [4] - 3:19; 7:3; 9:14, 16 notion [7] - 15:10; 28:24; 53:17;	75:13; 106:1; 111:20; 112:10 November [3] - 2:8; 82:14, 17 nowhere [1] - 41:21 NROTC [2] - 42:14; 44:18 number [5] - 53:9; 62:2; 69:15; 88:17, 19 Number [1] - 2:5 numbers [31] - 48:21; 49:18; 51:22; 52:8, 17-18; 60:2, 8; 62:7, 13, 18; 63:4, 6-7, 18-19; 64:12, 19; 65:4; 70:24; 71:7; 72:25; 94:12; 95:13; 101:23; 103:2, 5; 122:7, 9 O o'clock [1] - 122:16 obesity [1] - 68:25 objection [1] - 18:23 objectives [3] - 48:5; 86:15, 24 observe [1] - 68:22 obtain [1] - 42:6 obvious [3] - 65:18; 67:25; 121:17 obviously [8] - 12:6; 14:24; 16:20; 24:1; 45:16; 102:18; 112:14; 118:8 occurred [2] - 37:13; 87:17 OCS [1] - 10:2 October [3] - 7:21; 8:17; 39:6 offer [4] - 18:3; 36:11; 40:15; 81:16 offered [2] - 97:16; 102:25 Offers [1] - 82:16 offers [6] - 36:4; 81:8, 12; 82:5, 9, 18	Office [1] - 87:12 office [2] - 4:2; 70:11 officer [7] - 9:23; 10:5; 74:13, 21; 99:18 Officer [19] - 10:1; 45:19; 49:14; 50:16; 53:8; 59:16; 60:9; 61:14; 63:3; 64:3; 72:22; 73:9, 12; 74:19; 76:22; 88:16; 92:5; 99:13; 102:8 officers [34] - 45:17; 50:18; 57:22; 59:17; 62:2, 6, 23-25; 63:6, 15, 25; 64:7; 67:12; 72:8, 10, 16, 18, 21; 73:7; 77:17; 84:15; 88:18; 99:11; 100:1, 14; 106:23; 113:1; 122:5 Officers' [2] - 10:1; 41:14 official [5] - 4:9, 11-13; 7:13 officials [2] - 48:17; 95:2 often [1] - 82:12 old [3] - 40:14; 41:10, 21 older [2] - 43:24; 44:1 OMB [3] - 92:23; 93:7, 12 once [8] - 10:17; 34:15; 45:5; 93:20; 104:4, 13; 116:24; 120:20 one [73] - 3:3, 24; 5:20; 7:9; 9:3, 23; 10:6; 11:5; 14:10, 12; 16:16; 17:12; 18:8; 20:3; 21:4, 6, 13; 25:5, 20; 26:8, 19; 27:18; 31:2, 25; 32:9; 41:9; 43:4; 44:18; 47:16; 50:20; 53:6; 54:18, 24; 55:2; 59:22, 24; 60:3,	14; 63:8; 67:8; 69:15, 20; 72:19; 74:1; 77:5, 11; 79:2, 20; 80:11, 14; 81:6, 19; 82:22; 83:4; 86:14; 87:22; 90:7; 94:12; 97:15; 98:10, 17; 99:18; 103:13, 15; 110:21; 111:10; 112:8, 22-23; 120:21 one-count [1] - 7:9 ones [1] - 119:22 OPA [3] - 88:12; 92:13; 96:24 open [1] - 6:6 opened [1] - 38:17 operate [1] - 115:7 Operations [7] - 57:23; 61:21, 23; 73:3, 25; 107:1; 122:8 opine [3] - 9:15; 11:19; 103:20 opinion [37] - 6:22, 24; 7:1, 3; 8:22; 9:9, 14, 17; 11:1; 23:4; 27:5; 29:17, 19, 21; 32:25; 36:21; 38:19; 39:5; 45:23; 46:23; 47:16; 56:18; 76:6; 91:16; 94:8, 16; 99:1; 105:1; 107:21; 114:3, 8; 115:4, 11; 122:20, 23 opinions [3] - 24:2; 77:23; 102:25 opportunities [2] - 40:8, 22 opportunity [8] - 12:24; 16:10; 24:12; 31:22; 34:24; 40:12, 21; 41:6 opposed [2] - 21:14; 117:23 opposes [1] - 69:6 opposition [1] -	34:7 options [1] - 95:25 Order [1] - 2:2 order [19] - 19:13; 20:9; 22:10; 46:25; 47:1; 61:5; 81:1, 3, 12; 112:12, 16; 114:24; 115:22; 116:1; 119:4; 122:18, 24 ordered [1] - 22:17 organization [4] - 6:15; 22:22; 38:14; 108:5 organization's [1] - 15:21 organizational [1] - 29:23 original [1] - 52:5 ostensibly [1] - 87:23 otherwise [3] - 21:18; 24:12; 27:25 ought [2] - 12:1; 108:2 ourselves [1] - 10:14 out-of-order [3] - 81:1, 3, 12 outcomes [1] - 87:15 outside [1] - 72:17 outstanding [3] - 28:14, 22 outweighed [1] - 36:20 overall [4] - 50:6; 52:22; 63:2; 72:22 overly [1] - 69:17 overrule [1] - 112:20 overruled [1] - 43:12 overruling [1] - 20:16 overstated [2] - 35:20; 86:18 overturn [1] - 9:1 overwhelmingly [3] - 57:22; 65:21; 69:6 own [6] - 47:1; 55:11, 14; 57:21; 106:4;	117:1 P p.m [1] - 123:20 Pacific [3] - 64:7; 73:19; 76:16 page [3] - 17:23; 18:8; 86:7 Page [8] - 56:12; 57:3; 76:5; 79:8; 94:16; 96:6; 104:8; 107:4 pages [3] - 12:8; 34:7; 104:7 papers [11] - 10:16; 28:12; 38:25; 42:13; 57:14, 21; 59:11; 63:25; 64:5; 77:14 Paragraph [13] - 36:3; 67:17; 78:21, 23; 79:11, 24; 80:21; 81:10; 82:8, 11; 87:11; 90:16; 91:19 Paragraphs [2] - 89:13; 95:23 paramount [1] - 45:11 pardon [1] - 27:9 parenthetically [1] - 9:21 Parenthood [1] - 45:3 Parents [2] - 64:25; 101:24 parity [3] - 52:14; 56:13; 93:4 part [7] - 36:17; 39:14; 48:16; 67:2; 81:7; 90:17; 99:7 partially [1] - 13:2 participate [2] - 9:25; 40:18 participation [1] - 76:13 particular [7] - 41:1; 67:24; 74:17; 83:24; 91:15, 22 particularized [1] - 49:23 particularly [8] - 2:12; 65:15; 75:6; 79:6, 12; 81:23; 102:5;
--	---	---	---	---	---

Preliminary Injunction Hearing 12/14/23

123:16 parties [8] - 2:15; 20:5; 30:8; 84:22; 106:4; 117:3; 118:14; 119:7 partisan [1] - 65:22 partners [1] - 43:23 parts [3] - 21:7; 54:5; 104:18 party [9] - 11:11, 14; 31:2, 5; 34:4; 115:5, 8 pass [3] - 25:6; 47:18; 70:23 passed [1] - 27:4 passing [1] - 13:21 past [4] - 56:8; 58:19; 59:21 path [3] - 29:2; 70:18; 89:17 Patrick [1] - 4:1 pause [1] - 32:13 pending [7] - 6:12; 7:19; 8:17; 32:13; 105:9; 108:21; 112:18 penological [1] - 93:22 people [52] - 13:6; 17:20; 18:2; 21:6, 24; 23:11; 26:22; 27:14; 35:5; 36:4, 13, 18; 43:25; 47:9; 48:7, 15, 23; 49:1; 50:19; 51:2; 53:17; 55:23; 56:2; 58:9; 62:5; 65:6, 14, 22; 67:3, 7, 20; 68:4, 10, 13; 69:16; 70:10; 71:3; 73:18; 74:4; 84:6; 85:13; 91:15; 97:17; 116:25 People [1] - 87:12 percent [27] - 21:24; 47:9; 57:24; 61:20, 22; 62:4, 19-21; 63:1; 64:2-4; 72:11, 15; 73:2; 88:18, 20-21; 101:5; 106:23; 122:8	percentage [5] - 72:21; 74:3; 76:12, 14; 90:9 percentages [2] - 63:23; 84:11 perfect [1] - 103:16 perfectly [4] - 55:23; 107:19; 111:21; 112:21 perhaps [2] - 49:16; 116:11 period [4] - 16:13; 37:11; 43:3; 100:10 periodic [1] - 49:7 permit [1] - 9:7 perpetuity [1] - 25:3 Person [4] - 79:7, 12; 81:14; 82:24 person [3] - 5:21; 54:3; 101:21 personal [1] - 55:14 personnel [2] - 85:19; 102:7 persons [1] - 24:23 perspective [2] - 120:22 pertinent [1] - 90:12 Philip [1] - 7:19 physical [6] - 13:21; 17:18; 23:25; 25:6; 27:5; 28:1 PI [3] - 18:6; 60:13; 85:2 pieces [1] - 90:6 pigs [1] - 75:6 pike [1] - 104:4 pilot [1] - 72:13 Pipeline [1] - 114:7 pipeline [4] - 72:9; 73:10; 74:13; 84:16 place [4] - 28:7; 38:13; 52:25; 116:17 placed [1] - 72:11 places [2] - 53:2, 4 plaintiff [27] - 2:18; 6:15; 7:22; 13:22, 25; 24:11; 27:24; 38:18; 45:1, 13;	46:1, 8; 55:5; 58:2; 75:1; 78:16; 79:4; 81:20; 86:10, 23; 88:23; 90:18, 22; 92:3; 95:24; 97:1 plaintiffs [19] - 4:7; 15:2; 25:19; 37:22; 38:2; 39:11; 71:25; 73:11; 75:12; 77:8; 78:11; 80:25; 81:25; 84:22; 89:15; 93:19; 96:8, 20; 97:4 plaintiffs [19] - 12:22; 17:5; 24:23; 25:13; 38:13; 39:17; 40:3, 10; 41:5, 24; 78:1; 81:22; 82:9; 83:14; 88:9; 92:16, 18; 123:9 plan [1] - 104:23 Planned [1] - 45:3 plans [2] - 49:9; 118:4 play [2] - 77:12; 100:17 played [1] - 16:6 plays [6] - 21:23; 44:20; 60:21; 74:12; 89:12; 98:1 pleadings [1] - 2:20 pleasure [2] - 117:13; 118:7 plenty [4] - 44:20; 104:12; 117:7, 16 Plexiglass [1] - 13:3 plus [2] - 78:17; 81:7 pocket [2] - 27:19; 29:8 podium [4] - 12:25; 13:1; 86:11; 105:8 Point [5] - 7:8; 52:15; 120:18; 121:23; 122:9 point [63] - 2:19; 8:4; 11:25; 15:8; 23:7, 9; 26:25; 27:6; 28:24;	38:23; 41:20; 43:1, 5; 46:10; 49:5, 13; 51:9; 54:16; 56:17, 19-20; 57:7; 58:15; 59:1, 13, 20; 60:1, 20, 23; 61:7; 62:10; 64:11, 20; 66:3, 10; 73:10; 76:11; 78:24; 84:17; 92:16; 93:19; 94:11, 16; 96:20; 97:15; 100:24; 101:14; 102:3, 16; 103:21, 24; 104:18; 105:19; 109:25; 122:6 point's [1] - 63:20 points [8] - 26:19; 70:7; 79:1; 80:23; 82:23; 97:10; 101:11 poison [1] - 65:1 Police [1] - 31:11 policies [6] - 2:6; 6:21; 13:15; 15:5, 7, 25 policy [11] - 9:4; 35:16; 38:12; 60:22; 61:14; 78:7, 11; 83:10, 12; 91:14 politicized [1] - 69:17 poll [1] - 65:13 poof [1] - 73:8 pool [6] - 17:20; 18:2; 21:20; 25:15; 26:22; 28:1 population [10] - 49:15; 56:14; 62:20; 64:2; 76:14, 16, 20, 22; 93:5 portions [1] - 63:17 position [4] - 24:3, 17; 29:11; 42:4 positions [6] - 30:7; 74:3; 84:7, 13, 16 positive [2] - 52:6; 97:19 possibilities [1] - 58:13 possible [2] -	106:8; 118:9 possibly [2] - 54:22; 101:23 postpone [1] - 116:25 posture [7] - 6:3; 10:9, 14; 14:15, 23; 15:1; 19:6 potentially [6] - 7:4; 9:17; 32:25; 33:5; 75:21; 114:20 power [3] - 30:19; 98:12; 113:25 powers [1] - 115:1 practice [3] - 7:15; 37:2; 114:14 practicing [1] - 121:9 precariouly [1] - 120:10 precautions [2] - 2:11, 14 precedent [1] - 89:16 precise [1] - 50:16 precisely [1] - 73:5 preclude [1] - 107:16 predict [2] - 50:11; 66:11 predicted [1] - 67:6 prediction [1] - 104:2 prediscovery [1] - 20:12 prefer [1] - 50:21 preference [1] - 20:23 preferences [10] - 6:17; 51:24; 52:9; 53:1, 15-16; 66:25; 68:16; 69:17; 94:19 preliminary [52] - 6:12; 7:17, 22; 8:5; 11:8, 13; 12:10; 14:3, 10, 14, 18; 16:15; 19:6; 20:12; 24:19; 30:5, 17, 23; 31:7, 20; 32:4; 34:13; 35:1; 36:12, 15;	37:21; 38:3, 6; 40:5, 19; 41:2; 42:2; 43:18; 60:18; 66:10; 74:9; 83:15; 86:3, 8; 97:4; 104:2; 109:15, 22; 111:4; 112:14; 113:23; 114:4; 120:2; 122:21 Preparatory [1] - 85:11 prepare [1] - 115:18 prepared [8] - 20:4; 32:14; 110:4, 6, 12; 115:22; 116:6; 117:12 prerequisites [3] - 16:23; 17:17; 18:1 presence [3] - 52:23; 53:24; 54:2 present [6] - 5:14; 7:5; 9:18; 33:1; 95:5; 114:21 presented [5] - 10:16; 31:25; 33:3, 6, 22 preserve [3] - 30:7; 108:20; 114:5 President [2] - 6:22; 102:18 presiding [1] - 2:9 press [1] - 43:16 pressure [1] - 73:16 presumably [1] - 15:12 pretrial [1] - 116:4 pretty [12] - 25:9; 29:14, 17, 20; 38:18; 39:4, 7; 52:10; 67:25; 109:20; 111:19; 116:19 prevail [1] - 33:20 prevails [1] - 110:13 prevent [2] - 53:5; 95:3 prevented [1] - 39:17 prevention [1] - 87:20 prevents [2] -
--	--	--	--	---	---

Preliminary Injunction Hearing 12/14/23

<p>13:17; 82:8 previously [1] - 2:6 primary [4] - 13:12; 26:19; 27:6; 120:22 principle [1] - 69:11 Principles [2] - 7:16; 114:15 principles [1] - 84:25 priority [1] - 119:14 prison [5] - 87:19; 93:22, 25; 94:2; 95:2 prisons [2] - 69:10; 95:4 private [1] - 38:21 problem [8] - 13:17; 15:6; 58:6; 69:12, 18, 20; 107:2; 121:21 problems [9] - 46:24; 54:13; 57:8; 58:8, 22; 59:24; 102:20; 110:22 procedural [1] - 6:3 proceed [10] - 2:16; 6:1; 8:20; 12:19; 13:23; 31:23; 42:1, 5; 114:17, 23 proceeding [2] - 13:16; 114:15 proceedings [4] - 114:12; 115:13, 17; 123:20 proceeds [4] - 61:19; 71:25; 104:22; 114:16 process [42] - 10:9; 21:7, 9; 22:5; 27:12; 35:20, 25; 36:7, 13, 17; 47:7; 48:17; 52:12; 54:5, 14; 73:13; 74:15; 78:25; 79:5; 80:8, 24; 81:24; 82:23; 83:2, 8; 87:18; 90:6, 20, 24; 95:10; 96:4, 10; 100:14, 25; 107:1; 109:23;</p>	<p>117:6; 118:9 processes [1] - 95:9 professional [3] - 10:4; 83:23; 85:21 Professor [1] - 96:24 professors [1] - 21:13 proffer [4] - 24:22; 61:13; 65:25; 66:5 proffered [2] - 26:11; 70:4 proffering [2] - 14:9; 66:1 profile [1] - 23:22 program [5] - 9:6; 85:6, 10; 99:24; 100:3 programs [4] - 8:24; 9:7; 58:1; 94:10 progress [3] - 64:6, 8; 73:10 progression [1] - 81:4 prohibited [1] - 23:8 prohibiting [1] - 7:24 promise [2] - 20:4; 29:20 promotion [1] - 63:14 promptly [1] - 8:11 prong [1] - 66:14 pronouncing [1] - 5:18 proof [4] - 44:6; 52:6; 63:21; 103:2 proportion [1] - 11:22 prospective [1] - 36:8 prospectively [1] - 94:3 Protection [3] - 7:16; 8:25; 114:15 protective [2] - 19:13; 20:9 prove [7] - 18:21, 23; 22:7; 60:19; 61:1; 62:15; 65:4 proved [4] -</p>	<p>22:13; 55:5; 60:25; 69:25 provided [6] - 13:25; 75:22; 81:9; 82:12; 88:9; 107:8 providing [1] - 89:3 pseudo [2] - 16:4; 22:23 pseudonymity [1] - 18:24 pseudonymous [2] - 18:20; 19:11 pseudonyms [5] - 19:4; 23:8, 22; 24:4; 25:10 Public [1] - 6:4 public [44] - 2:7; 6:6, 9-10; 8:2; 9:12, 22; 11:15; 12:3; 16:5, 19; 20:5, 10; 28:17; 30:15; 31:6, 24; 32:18, 20; 33:16; 35:10; 13-14; 45:10; 51:14; 60:15; 61:4; 62:2, 11; 64:6, 11, 20, 22; 66:3, 8; 69:5; 77:13; 85:10 public's [1] - 69:12 publicly [2] - 13:8; 16:8 pudding [1] - 103:2 pun [1] - 27:10 punchline [1] - 74:11 pure [1] - 68:14 purely [1] - 104:19 purportedly [1] - 63:14 purpose [10] - 9:21; 30:6; 48:8; 62:11; 64:20; 88:4; 93:1; 101:22 purposes [5] - 25:7; 32:17; 40:2; 48:7; 64:11 pursuant [1] - 6:8 pursue [2] - 23:24; 110:18 pursuing [2] -</p>	<p>41:25; 53:20 push [1] - 33:9 put [5] - 19:19; 73:15; 93:13; 113:4; 118:24 putting [2] - 8:14; 25:23</p> <p>Q</p> <p>qua [1] - 49:22 qualifications [1] - 67:4 qualified [3] - 22:15; 79:14; 81:16 qualitative [1] - 74:25 quantify [2] - 34:18; 35:2 quantitative [1] - 74:24 questioning [2] - 25:8; 102:12 questions [15] - 10:21, 23-24; 11:2; 20:11; 71:20, 22; 93:18; 98:16; 106:8; 110:11; 113:18; 121:25 quick [3] - 39:7; 80:23; 118:9 quicker [1] - 121:17 quickly [9] - 8:8; 29:17, 20; 39:4; 86:25; 91:10; 105:4; 106:7; 108:20 quite [8] - 29:10; 35:20; 52:11; 56:8; 63:11; 83:9; 86:5; 94:20 quo [3] - 86:9; 114:5, 10 quote [5] - 76:2; 79:5; 90:5; 94:18; 104:9 quoted [1] - 10:17 quotes [2] - 103:13, 15 quoting [2] - 33:14; 78:24</p> <p>R</p> <p>race [178] - 6:20; 7:15, 24; 9:3;</p>	<p>10, 15; 21:5, 7, 10, 17, 19, 23; 22:3, 5-7, 18; 27:2; 32:14; 34:5, 11; 36:16, 23, 25; 37:2; 39:18, 20; 43:11, 15, 17; 46:23; 47:5, 8, 11, 13; 48:18; 49:6, 8, 10, 18, 21-22; 50:1, 6, 9, 11, 15, 18, 20-21; 51:20, 22-23; 52:9, 12, 14, 20; 53:3, 10, 18, 24-25; 54:2, 4-5, 7-8, 10, 12; 55:21; 56:7; 58:7, 23-24; 59:8, 24-25; 62:15; 63:14; 65:19, 21; 66:8, 19; 67:11; 68:20, 24; 69:6, 11, 14; 72:4; 73:12; 74:14; 75:3, 7; 77:9, 19; 78:1, 17, 25; 79:12, 20; 80:7, 11, 15, 18-19, 25; 81:6, 8-9; 82:21, 23, 25; 83:5-7; 87:16, 22; 89:1, 23-25; 90:2-4, 8, 11, 16, 20, 23-24; 91:1, 7; 92:14; 95:3, 9, 11, 15, 17, 21, 25; 96:3, 9, 22; 97:19, 25; 98:7, 9-10, 16; 99:3, 12, 15, 17; 100:5, 13, 21, 25; 101:5, 11, 16-18, 20, 24; 103:14; 104:15; 105:10; 114:13 Race [1] - 79:6 race-based [8] - 6:20; 46:23; 53:10; 54:12; 55:21; 58:23; 101:11 race-conscious [2] - 7:15; 114:13 race-neutral [13] - 21:5, 7; 22:6; 47:11; 51:23; 52:9, 14; 54:8;</p>	<p>95:17, 21, 25; 100:5, 13 racess [2] - 65:22; 67:4 racial [80] - 6:16; 20:23; 21:24; 22:4; 32:12; 35:4; 36:20; 42:21; 47:21; 48:19; 49:14, 24-25; 50:3-5, 15-16, 20, 23; 51:2, 5, 13, 22-24; 52:8, 15, 25; 53:7, 15-16; 54:23; 55:13, 17-18; 56:13; 57:17; 58:19; 59:14, 16, 24; 60:9; 61:14; 62:16; 63:1, 5; 64:15; 65:1; 66:25; 68:3, 7, 11, 16; 69:17; 87:7; 89:6, 24; 91:15; 92:9, 18, 23; 93:11; 94:19; 95:3; 99:12; 101:7, 9; 102:4, 13-14; 103:13 racially [15] - 32:9; 40:8; 63:12; 65:14; 67:9; 69:22; 74:19; 88:5; 92:5, 12; 95:13; 98:18 racism [1] - 52:24 racist [1] - 52:24 raise [1] - 113:11 raised [5] - 11:16; 24:16; 123:7 rambling [1] - 55:4 ramp [1] - 52:13 Rand [1] - 87:9 rank [8] - 57:22; 59:17; 81:4; 84:12, 15; 106:23; 122:9 ranking [2] - 63:5, 15 ranks [11] - 10:5; 56:15; 57:25; 58:1; 59:15, 19; 61:15; 62:5; 68:6; 76:13, 17 rate [3] - 65:16; 102:6</p>
---	--	---	--	---	--

Preliminary Injunction Hearing 12/14/23

rather [6] - 50:18; 79:13; 91:23; 92:8; 96:16; 114:5 rationale [1] - 43:12 rationales [1] - 86:11 RDB-23-2699 [1] - 2:5 re [1] - 37:1 re-evaluating [1] - 37:1 reaching [2] - 30:19; 113:25 reaction [1] - 116:16 read [6] - 10:25; 43:15; 77:14; 96:7; 101:12, 17 readiness [4] - 48:8; 87:15; 88:14; 92:10 reading [1] - 34:10 readjust [1] - 49:17 ready [9] - 5:25; 17:12, 25; 22:11, 13; 25:14; 45:24; 71:22; 74:20 real [10] - 16:4; 19:1; 27:5; 58:22; 65:2; 74:24; 77:11; 92:8; 97:1; 101:19 real-world [4] - 74:24; 77:11; 92:8; 97:1 reality [2] - 102:3; 105:12 realized [1] - 110:22 really [52] - 15:1; 18:19, 24; 19:20; 21:1, 6; 28:6; 29:24; 30:1; 33:2; 34:6, 12, 16; 35:10, 13; 36:1, 22; 43:14, 23; 44:6, 14; 48:25; 50:13; 51:21; 52:5; 54:21; 58:6; 59:6; 62:9; 68:7, 18; 70:17; 80:8; 84:15, 21; 99:20; 100:16;	101:20; 102:3, 23; 104:10; 105:4, 19; 106:15, 21; 107:10, 24; 115:6; 119:21 reapply [2] - 26:14; 41:6 reapplying [1] - 26:20 Rear [2] - 4:13; 7:11 reason [13] - 10:22; 21:17; 22:8; 25:20; 40:4; 49:23; 63:8; 68:23; 69:15; 74:9; 95:4; 98:12; 101:25 reasonable [2] - 93:7; 121:20 reasons [7] - 39:12; 49:13; 68:9; 97:3; 115:3; 122:19, 22 reassigned [1] - 119:14 rebut [1] - 97:2 rebuttal [3] - 77:8, 23; 97:8 rebutted [1] - 97:13 receive [4] - 10:3; 80:19; 81:16 recent [2] - 38:4; 45:4 recently [5] - 2:10; 58:6; 84:1; 85:1; 100:8 recognize [1] - 105:13 recognized [3] - 76:2; 84:1; 85:2 recognizing [1] - 75:20 recommissions d [1] - 113:4 record [40] - 2:21; 3:6, 11, 25; 4:15; 9:21; 23:3; 30:6; 44:17; 45:22; 66:12, 21; 77:21; 78:15; 80:6; 81:2; 103:17; 104:6, 9; 105:23, 25; 106:20; 107:14;	108:1; 110:11, 15-16; 112:1; 114:18; 115:4; 116:11, 20; 117:24; 122:19, 22; 123:6, 11 record's [1] - 102:2 records [2] - 104:13; 106:12 recruited [1] - 72:17 recruiting [1] - 68:2 recruitment [6] - 68:20; 74:21; 88:11, 24; 89:8; 92:10 reenforce [1] - 53:17 refer [4] - 9:5; 11:6; 16:2; 48:22 reference [6] - 16:3; 29:16; 41:13; 57:2; 59:10; 84:3 referenced [1] - 44:18 referred [2] - 2:19; 28:18 referring [4] - 6:25; 21:14; 22:23; 63:17 refers [1] - 87:9 reflect [2] - 44:17; 56:15 reflected [2] - 80:7; 96:23 reflects [3] - 12:6; 80:6; 92:12 refusal [1] - 60:6 refutes [1] - 78:18 regard [4] - 8:12; 11:4; 59:20; 103:19 regardless [1] - 37:11 regime [2] - 43:13; 100:17 regulations [2] - 10:12 Rehab [1] - 41:1 rejected [3] - 22:14; 37:24; 49:4 rejection [1] - 92:21 relate [1] - 102:7 relations [1] -	92:15 relationship [1] - 68:21 relative [1] - 30:7 relevance [2] - 37:23; 76:3 relevant [6] - 20:13; 53:18; 64:14; 76:5; 83:24; 95:8 reliably [3] - 50:11; 51:16; 66:23 relief [13] - 8:1; 9:20; 11:13; 37:21; 38:3; 42:7; 58:12; 61:6; 105:9; 109:25; 111:2, 8 relies [2] - 50:8; 92:23 religion [1] - 98:8 reluctant [1] - 85:18 rely [2] - 37:3; 86:2 relying [3] - 88:23; 92:20; 96:6 remain [1] - 23:23 remains [3] - 38:21; 71:13; 95:11 remand [1] - 106:3 remanded [1] - 115:20 remedied [2] - 26:1; 34:20 remedies [2] - 11:9; 32:5 remedy [6] - 30:14, 18; 40:2; 46:9; 55:7; 113:24 remember [3] - 93:3; 94:25; 96:18 remind [1] - 85:9 repaired [1] - 34:19 repeat [1] - 63:19 repeatedly [2] - 78:16; 81:22 reply [5] - 33:25; 78:11; 79:9; 81:23; 117:25 report [6] - 47:24; 78:4; 87:9; 115:25; 116:2;	119:6 reported [1] - 93:6 represent [1] - 14:12 representation [1] - 64:7 represented [1] - 70:22 request [5] - 8:1; 38:4; 114:10; 115:25; 119:10 requests [1] - 116:4 require [3] - 75:4; 103:22; 107:13 required [2] - 2:6; 79:8 requirement [2] - 47:19; 66:17 requirements [7] - 11:8; 13:20; 20:21; 23:25; 25:17; 26:21; 31:8 requires [3] - 9:10; 32:13; 95:12 rescind [1] - 36:11 research [8] - 11:21; 18:14, 16; 87:7; 89:12; 92:11; 96:23; 110:2 resentment [1] - 53:16 Reserve [2] - 9:25; 41:14 resolution [1] - 113:21 resolve [3] - 44:22; 67:21; 106:17 resolved [4] - 26:4; 42:3; 106:7 Resources [1] - 30:25 respect [51] - 6:11; 7:7; 10:13; 11:7; 13:11; 18:5; 27:10, 15; 30:2; 44:16, 24; 46:6, 12, 14; 50:18; 54:19; 56:17; 57:1; 58:15; 59:9; 70:8, 17-18, 24; 71:5; 77:14, 16;	82:20; 83:22; 84:17; 86:2; 87:1; 88:11; 89:10, 20; 91:10; 93:19; 94:8, 12; 99:24; 102:6, 25; 106:10; 109:15; 110:7; 111:9; 114:9; 122:19 respected [3] - 69:20; 70:19, 21 respectfully [4] - 39:9; 60:11; 89:1; 111:3 respects [1] - 36:23 respond [4] - 7:8; 12:24; 31:23; 43:21 responded [2] - 11:5; 39:20 responding [1] - 8:13 response [5] - 22:21, 24; 65:16; 92:17; 108:1 result [2] - 13:15; 103:4 results [1] - 57:14 retaining [1] - 68:2 retention [6] - 74:21; 88:11, 14, 24; 89:7; 92:10 retired [1] - 77:17 retrofitted [1] - 13:2 return [1] - 88:13 revealed [2] - 20:10; 101:16 reversed [4] - 31:11, 13; 109:18, 22 reverses [1] - 115:17 review [7] - 9:8; 23:20; 49:7; 51:8; 81:7; 85:20; 89:11 reviewing [2] - 43:17; 106:12 reviews [1] - 95:9 revoked [1] - 40:15 revolves [1] - 83:20 rewarded [1] -
--	--	--	---	--	--

Preliminary Injunction Hearing 12/14/23

68:15 Richard [1] - 3:2 Richmond [6] - 106:2; 110:1, 8; 111:12; 112:10 richness [1] - 91:17 right-away [1] - 116:18 rights [6] - 34:17; 35:7; 36:21; 37:23; 41:25 riots [7] - 53:24; 54:2, 4, 7; 58:7; 87:16 rise [1] - 102:22 risk [1] - 36:22 risked [1] - 91:15 road [5] - 24:16; 27:15; 55:15; 62:9; 72:20 Roberts [2] - 9:9; 114:21 Roberts' [9] - 32:25; 38:19; 39:4; 56:18; 59:4; 94:7, 16; 103:12; 107:21 Rocah [1] - 5:18 Rocket [1] - 117:1 role [7] - 21:23; 68:4; 74:12; 89:3, 12; 98:1; 100:16 rolling [1] - 123:17 Rostker [1] - 85:1 Roswell [2] - 38:4; 43:7 ROTC [9] - 10:1; 58:1; 62:6; 99:11, 18, 24; 100:2, 7 rough [1] - 93:4 route [1] - 110:4 rubric [1] - 9:8 Rule [2] - 116:3; 119:8 rule [8] - 21:1; 27:8; 30:3; 101:10; 104:1, 24 rules [2] - 6:9; 98:2 ruling [5] - 31:12; 42:20; 45:21; 113:12; 115:15 run [2] - 106:1; 118:2 Ruppersberger	[1] - 27:13 rush [1] - 121:23 S safest [2] - 117:6; 118:3 Safety [1] - 20:15 sailors [3] - 64:2; 65:10; 66:25 sake [1] - 94:5 sand [1] - 58:18 sat [1] - 105:18 satisfied [8] - 11:10; 22:12; 23:25; 29:16; 30:22; 31:1, 9; 44:13 satisfy [9] - 31:20; 33:4, 10; 49:8; 51:19; 61:1; 65:7, 13; 92:19 satisfying [2] - 9:6; 48:11 Saturday [2] - 27:14; 122:1 save [1] - 111:22 saw [2] - 10:17; 59:11 schedule [5] - 8:6; 108:15; 118:25; 119:25; 120:1 scheduled [3] - 6:11; 30:10; 119:13 schedules [2] - 118:11; 119:21 scheduling [8] - 112:12, 16; 114:24; 115:22; 116:1; 119:4; 122:24 School [2] - 10:2; 85:11 school [5] - 6:17; 40:18; 41:19; 48:17; 90:12 school's [1] - 9:6 schoolers [1] - 104:21 score [5] - 21:9, 14, 18; 22:4; 79:8 scores [3] - 79:13, 17; 80:20 scoring [3] - 79:16; 81:14, 18 scrutinize [1] - 86:11	scrutiny [43] - 9:8; 36:25; 46:15, 19-20; 57:12; 60:12, 22; 61:2, 8, 13, 17; 64:15; 65:7, 13; 66:14, 18; 68:6; 69:24; 76:3; 84:23; 86:20; 92:20; 94:10; 97:24; 98:1; 99:4; 101:2, 8, 23, 25; 102:9, 21; 103:21; 107:25; 114:17, 22 SDNY [1] - 24:8 sea [1] - 64:18 seal [2] - 19:13; 20:10 Seals [1] - 69:21 seated [2] - 4:7; 6:2 seats [1] - 96:9 Second [1] - 24:9 second [10] - 3:3, 24; 47:20; 70:10; 72:3; 76:24; 78:3; 79:4; 83:2; 100:24 second-guess [1] - 78:3 Secretary [2] - 4:10 security [14] - 45:12, 15, 19; 74:16; 75:8; 86:15; 89:8, 16; 92:2; 93:2; 94:21; 96:2; 99:14 Security [1] - 96:17 see [20] - 3:5; 5:21, 24; 11:22; 36:3; 43:25; 48:21; 59:14; 68:5; 74:1; 75:3; 84:11; 86:4; 103:19; 106:16; 108:12; 113:1; 121:21 seek [6] - 14:14, 18; 16:15; 26:15; 91:21; 115:13 seeking [10] - 9:20; 14:10; 37:21; 38:6; 42:7; 46:9;	51:10; 57:11; 78:2; 93:15 seeks [2] - 86:9; 91:24 seem [1] - 58:17 selected [3] - 81:15; 90:13, 20 selection [1] - 81:24 selections [1] - 81:3 selective [1] - 69:6 self [1] - 6:16 self-described [1] - 6:16 send [4] - 21:16-18; 36:2 sending [1] - 100:14 sends [2] - 99:18 Senior [1] - 105:18 senior [7] - 40:21; 72:9, 15; 73:7, 9, 12; 74:13 sense [1] - 54:1 sensitive [1] - 120:25 sentence [2] - 17:23; 18:8 separate [2] - 25:7; 26:1 separately [1] - 25:15 September [6] - 82:13; 117:7; 118:5, 17; 120:24; 121:2 Serco [1] - 40:25 serious [2] - 54:3; 56:3 seriously [4] - 54:24; 55:3; 80:9; 95:24 serve [3] - 50:25; 69:1; 72:13 serves [1] - 101:22 service [9] - 15:3; 16:22; 39:23; 43:10; 72:12; 75:5; 84:12; 87:25; 91:6 set [14] - 6:3; 30:24; 65:3; 112:15; 115:3; 116:12, 20, 24; 117:5, 7; 118:1; 122:19, 22	sets [1] - 29:3 setting [1] - 10:8 seven [3] - 95:21; 109:19; 110:25 several [3] - 35:11; 106:22; 123:9 severe [2] - 25:5; 65:2 SFFA [15] - 2:19; 6:13; 7:9, 21; 11:4; 13:22; 14:6, 8, 14; 15:8, 11, 15; 16:14, 17; 19:10 SFFA's [3] - 6:18; 8:22; 29:23 shallow [1] - 27:10 shape [1] - 112:18 shared [1] - 91:23 sheet [1] - 3:12 Sherwood [1] - 92:16 shifting [1] - 58:18 ship [2] - 113:3, 5 short [2] - 9:6; 89:15 shorthand [1] - 85:16 shortly [3] - 11:15; 82:14; 122:21 show [14] - 17:12, 14, 21; 22:19; 24:11; 25:25; 27:2, 25; 40:5; 61:5; 77:24; 89:18; 103:7 showed [1] - 88:15 showing [5] - 17:25; 25:15; 31:8; 88:16; 114:12 shown [1] - 28:12 shows [6] - 21:22; 75:22; 83:14; 85:1; 99:2 side [8] - 4:7; 35:14; 54:18; 63:9; 67:14; 105:7; 110:12; 118:23 sides [5] - 8:12; 12:19; 67:25; 106:20; 108:15 sign [1] - 67:15 significance [1] -	81:25 significant [6] - 17:7; 37:22; 75:24; 76:18; 78:10; 90:9 signs [1] - 38:10 silly [1] - 54:6 similar [3] - 7:17; 64:8; 92:21 similarly [2] - 40:17; 101:16 simple [1] - 116:23 simply [12] - 13:16; 15:11; 73:13; 75:3; 76:7; 77:24; 85:23; 89:9; 90:22; 93:13; 97:1 single [3] - 17:22; 18:8 single-page [1] - 18:8 sit [5] - 29:13; 63:22; 70:11; 105:20; 106:22 sitting [1] - 13:6 situations [5] - 56:3, 7; 58:10; 103:1; 116:7 six [7] - 2:11; 43:9; 94:9; 100:13; 106:17; 109:4, 8 sixth [1] - 94:9 skin [2] - 32:10; 67:24 slot [1] - 24:13 small [1] - 12:5 smile [2] - 122:5 smiling [1] - 120:11 so-called [2] - 21:5; 43:5 societal [2] - 89:4 society [1] - 69:8 softly [1] - 55:9 soldiers [1] - 67:1 sole [1] - 15:20 solely [1] - 82:23 Solicitor [4] - 39:21; 96:6; 101:12, 17 solution [4] - 55:21; 58:23, 25 solve [3] - 58:6; 68:23; 102:19 solving [2] - 54:13; 107:2
---	--	---	---	---	---

Preliminary Injunction Hearing 12/14/23

someday [2] - 33:20; 72:19	specifics [1] - 21:15	67:15	112:21; 113:2; 120:3	92:13; 96:21, 24	95:2
someone [5] - 21:17; 22:4; 29:7; 85:4; 107:18	speculating [1] - 58:5	States [15] - 2:4; 4:9, 12; 6:14; 7:7, 10; 9:16, 24; 10:7, 10-11; 14:16; 30:24; 70:20; 106:10	stopped [1] - 112:24	subject [4] - 16:20; 27:3; 28:3; 109:20	suggesting [6] - 54:9, 11-12; 58:5; 117:24; 122:11
sometime [2] - 117:5; 122:17	speculative [2] - 25:21; 57:17	status [7] - 2:15; 33:7; 86:9; 100:3; 114:5, 10; 116:18	stopping [1] - 105:10	subjected [1] - 51:8	suggestion [4] - 8:20; 11:5; 37:22; 73:11
sometimes [1] - 85:16	speech [1] - 38:6	statute [1] - 10:10	stops [1] - 26:20	subjects [1] - 81:4	suggests [1] - 81:20
somewhat [1] - 13:2	Speech [1] - 19:4	statutory [1] - 26:21	strategic [2] - 39:12, 16	submarines [1] - 72:13	suit [2] - 15:16, 18
somewhere [1] - 59:10	speed [1] - 109:23	stay [15] - 12:24; 50:22; 68:5, 13; 73:17, 19; 74:4; 111:15; 112:18; 113:5; 115:10, 13, 16, 18; 120:2	strategy [1] - 110:18	submission [5] - 13:13, 20; 64:9; 78:3; 87:13	sum [3] - 47:7, 9; 97:20
soon [1] - 49:10	spend [2] - 85:13; 111:12	statute [1] - 10:10	Strawbridge [2] - 4:1, 4	submit [5] - 22:10; 44:5; 60:11; 62:14; 63:15	summarily [2] - 58:12; 61:6
sophomore [1] - 28:20	spent [1] - 100:24	statutory [1] - 26:21	STRAWBRIDGE [1] - 4:5	submitted [5] - 67:13; 68:13; 82:14; 85:25; 104:7	summarized [1] - 31:9
sorry [10] - 18:3; 76:21; 80:16; 85:5; 96:18; 108:25; 111:7	split [1] - 24:7	stay [15] - 12:24; 50:22; 68:5, 13; 73:17, 19; 74:4; 111:15; 112:18; 113:5; 115:10, 13, 16, 18; 120:2	street [1] - 38:10	submitting [2] - 17:8	summarizing [1] - 33:15
sort [11] - 5:22; 21:20; 25:6; 35:25; 38:20; 47:22; 48:6; 67:15; 79:15; 84:6; 97:17	spot [1] - 34:25	steady [1] - 116:19	strenuous [1] - 109:20	substantial [3] - 77:1, 4; 87:6	summary [4] - 18:7; 29:6; 33:7, 17
sorting [1] - 49:2	stake [1] - 32:8	STEM [1] - 79:22	stretch [1] - 55:16	substantially [1] - 78:7	summer [5] - 117:6, 9; 118:2, 11, 16
sorts [1] - 53:2	stand [5] - 5:16; 54:20; 108:3, 8; 113:3	step [3] - 26:18; 71:16; 110:25	strict [39] - 9:8; 36:25; 46:15, 18-19; 57:12; 60:12, 22; 61:2, 7, 13, 17; 64:15; 65:7, 13; 66:14, 17; 68:6; 69:24; 84:22, 24; 86:20; 92:20; 94:10; 97:24; 98:1; 99:4; 101:2, 8, 23, 25; 102:9, 21; 103:21; 107:25; 114:17, 22	succeed [10] - 11:12; 31:3, 16; 37:7; 45:8; 46:3; 83:14; 109:16; 114:13	Summers [2] - 23:4, 13
Sotomayor [1] - 10:17	standard [6] - 22:12; 30:5; 31:13; 46:4, 14	steps [1] - 28:25	Strict [1] - 76:3	successful [2] - 15:10; 95:22	summertime [1] - 39:6
sought [1] - 43:18	standing [44] - 11:7, 16; 12:1, 18, 22; 13:11, 19; 14:2; 15:1, 15, 21; 16:15; 18:6, 22-23; 19:2, 4, 6-7; 20:14; 22:10, 17, 19, 21-22; 24:5, 18; 25:8; 26:12, 24; 28:4, 6-7, 24; 29:6, 14, 16, 23; 30:2, 4; 31:14; 41:24	stereotype [7] - 50:3, 9, 12; 90:24; 91:14; 92:7	strictly [2] - 54:8; 69:11	success [13] - 12:5, 8, 11; 44:15; 46:3, 5, 11; 60:19; 61:5; 64:17; 67:7; 87:19; 103:20	sunset [3] - 49:6, 12
sound [2] - 12:13; 72:25	stands [4] - 25:20; 80:12; 107:7; 123:18	stereotyping [4] - 49:24; 51:5; 91:10; 92:4	strong [3] - 25:9; 39:13; 44:21	sued [3] - 15:2, 11; 43:18	Superintendent [1] - 4:14
sounds [1] - 109:17	star [1] - 63:9	stick [2] - 57:16; 119:11	strongly [1] - 97:3	suffer [3] - 11:13; 31:3; 35:17	superintendent [5] - 17:2, 4; 79:25; 80:3, 6
source [2] - 59:17; 84:21	start [7] - 9:19; 10:16; 35:22; 64:15; 72:6; 116:6	stigma [3] - 53:16; 67:3, 5	struck [3] - 15:13; 78:8; 123:10	successful [2] - 15:10; 95:22	superintendent' [1] - 28:11
sources [1] - 82:3	started [2] - 66:9; 87:17	still [23] - 2:8, 11, 13; 13:2; 42:21; 52:25; 53:3; 61:16; 63:1; 69:22; 70:19; 71:15; 81:16; 97:12, 16; 100:7; 101:2, 7; 102:15, 19; 105:20; 115:6	Struggle [3] - 31:10; 34:14; 109:19	suddenly [2] - 109:6; 120:1	superintendents [1] - 28:21
Southern [3] - 7:6, 18; 40:14	starting [1] - 101:3	stop [13] - 22:17; 36:16; 49:9; 51:22, 25; 83:1; 91:8; 99:11; 111:10, 14;	stuck [1] - 49:3	superintendant [1] - 4:14	supervision [1] - 96:15
sovereign [1] - 34:21	starts [1] - 62:13		students [13] - 9:10; 21:4, 7; 34:24; 47:11, 22; 72:8; 79:14, 17; 89:4; 101:6; 104:21; 107:8	support [3] - 24:3; 57:12; 70:12	supported [1] - 92:13
sparingly [3] - 30:19; 80:5; 113:25	state [2] - 81:22; 101:6		Students [6] - 2:3, 18; 3:6; 6:14, 22; 114:9	supported [1] - 92:13	supporting [3] - 77:19; 87:7; 88:25
speaking [2] - 25:23; 80:2	statement [1] - 79:10		studies [3] - 52:19; 88:12; 106:8	suffered [1] - 13:14	supposed [2] - 65:6; 100:16
spear [1] - 72:13	statements [1] -		study [6] - 52:19; 87:13; 88:12;	sufficient [7] - 40:9; 49:8; 65:13; 69:25; 89:6; 117:16; 118:9	Supreme [36] - 6:20; 7:1; 8:21; 14:23; 15:13, 15, 20; 23:4; 30:24; 32:17, 21-23; 33:5, 18; 35:5; 37:24; 38:1; 47:17; 48:9; 49:3;
special [1] - 25:17				sufficiently [6] - 9:7; 51:12; 67:9	
specific [8] - 23:6, 11; 25:11; 32:21; 33:18; 41:13; 50:10				suggest [8] - 39:9; 55:12, 15-16, 19; 58:6; 95:25; 104:5	
specifically [10] - 7:1, 3; 9:16; 10:8; 32:23; 44:18; 46:3; 56:12; 87:10; 114:6				suggested [1] -	

Preliminary Injunction Hearing 12/14/23

<p>53:11; 67:6; 68:3; 69:9; 77:6; 83:5, 22; 88:23; 97:18; 98:17; 99:16; 110:14; 123:5 survey [1] - 88:2 surveys [7] - 65:9, 12, 15, 17; 87:25; 88:4 survive [4] - 60:22; 61:17; 68:6; 114:21 survives [2] - 57:12 suspect [2] - 111:25; 113:10 sway [1] - 99:19 switched [1] - 47:10 sworn [1] - 70:11 system [7] - 5:22; 47:24; 53:5, 14; 97:20; 101:14</p>	<p>tends [1] - 68:16 tension [8] - 55:13, 17-18; 57:17; 58:19; 59:19, 24; 61:15 tensions [3] - 54:23; 102:13 term [2] - 48:22, 24 terms [68] - 8:13; 9:20; 10:8, 15; 11:2; 14:23; 15:1; 20:17, 21; 21:13; 24:22; 25:8; 27:18; 28:6, 9; 31:19; 33:7; 37:6; 45:19; 48:20; 52:15; 57:8, 10, 21, 23; 59:13; 60:20; 61:7, 12; 63:22; 64:14, 17; 65:16; 66:21, 24; 67:9; 72:23; 73:2; 74:3; 77:13, 19; 81:21; 84:2, 7, 12; 85:13; 86:19; 87:24; 102:22; 103:1, 3, 18; 107:4, 22, 25; 110:2; 117:4; 118:7, 10, 25; 120:2; 121:15, 20, 24; 122:8 terrible [1] - 39:14 test [4] - 30:24; 34:23; 51:19; 60:7 THE [157] - 2:3, 23; 3:1, 3, 10, 15, 18, 22, 24; 4:6, 19, 22; 5:1, 5, 8, 16; 6:5; 12:16, 18; 13:10; 14:3, 9, 16, 22; 15:14, 18; 16:1, 11, 13; 17:2; 18:10, 15; 19:15, 19, 23; 20:4; 21:12; 22:20; 23:2, 14, 16, 20; 24:15, 18, 22; 25:1, 3; 26:2, 7, 11; 27:8, 18; 28:5, 16; 29:12; 32:16; 33:11, 13; 34:2; 37:5,</p>	<p>9, 15, 17; 38:9, 15, 25; 39:2; 41:12, 17; 42:8, 11, 16, 19; 43:1, 6, 22; 44:7, 12; 46:18; 47:2; 54:9, 16, 18; 55:2, 22; 56:2, 25; 57:7; 59:2; 60:15; 61:3, 25; 63:16; 65:25; 70:2; 71:10, 19, 24; 72:19, 23; 73:15, 24; 76:10; 77:13; 78:13, 19; 79:25; 80:4, 12; 83:19; 84:2; 85:7, 10, 13; 86:1, 17; 91:12; 93:24; 94:6; 97:6, 11; 98:20, 23; 99:23; 100:3, 7, 10; 102:2; 104:25; 105:5, 11; 108:7, 12, 17, 23, 25; 110:19; 111:6, 8, 18; 113:8, 10, 15; 117:17; 118:18; 119:2, 17, 25; 120:7, 9; 121:1, 4, 6, 11, 22; 122:5, 15 themselves [2] - 2:20; 4:15 theory [6] - 27:11, 18; 68:4; 75:12 there'll [1] - 123:2 therefore [6] - 17:20; 83:5; 84:23; 87:4; 89:9; 100:2 thereof [2] - 42:21; 116:12 they've [18] - 13:14, 24; 17:19; 18:1, 6; 22:14; 25:16; 27:4; 35:18; 41:10; 68:9; 69:25; 74:5; 97:25; 98:5, 7; 102:14 thinking [1] - 118:16 thinks [2] - 54:4; 111:25 third [2] - 2:10;</p>	<p>49:5 thirdly [1] - 3:22 Thomas [1] - 3:23 thorough [1] - 113:16 three [8] - 5:17; 31:4, 15; 32:10; 63:9; 75:16; 83:10; 99:19 three-star [1] - 63:9 throughout [5] - 22:5; 48:14, 24; 92:24; 102:5 throw [2] - 70:24; 71:7 throwing [1] - 61:8 thrown [1] - 71:3 thrust [4] - 22:20, 23, 25; 56:16 tie [2] - 55:20; 80:25 tied [2] - 49:14, 16 tightest [1] - 117:23 tip [2] - 72:13; 90:8 today [17] - 2:13; 10:14; 30:16; 32:15; 36:9; 45:22; 61:5; 72:19; 83:20; 88:19; 94:20; 104:24; 105:7; 108:4, 8; 122:18 today's [2] - 29:21; 73:6 together [4] - 48:20; 67:21; 107:12; 118:24 tomorrow [9] - 73:13; 112:17; 115:5, 10, 24; 116:2; 119:5; 120:3 took [6] - 20:2; 101:24; 105:17; 111:4; 112:8; 116:14 top [1] - 79:16 top-scoring [1] - 79:16 Toro [3] - 4:10; 7:11; 85:2 totally [5] - 55:14; 100:13; 103:16; 104:11; 108:10 town [1] - 88:1 track [1] - 106:14</p>	<p>traditionally [2] - 16:24; 85:18 Training [2] - 10:1; 41:15 training [4] - 10:5; 67:1; 72:8; 85:4 transformative [1] - 38:17 translate [4] - 59:9; 64:13; 73:1 translates [1] - 73:12 tread [1] - 55:9 treat [3] - 35:6; 53:18; 89:24 treating [2] - 51:2; 90:24 trial [33] - 10:18; 14:7; 30:8-10; 60:21; 105:24; 108:10, 15; 112:4-6, 9, 15-16; 114:24; 115:23; 116:8, 13-14, 17, 19, 24; 117:5, 11, 16, 23; 118:3, 10; 119:11; 120:23 trials [3] - 14:4; 117:21; 119:13 tried [2] - 108:14 tries [3] - 52:3; 53:6 triggers [2] - 101:2, 8 triply [1] - 100:14 trouble [1] - 11:1 troublesome [1] - 92:14 true [5] - 47:17; 82:5; 95:5; 97:25; 101:1 truly [1] - 105:12 Truman [1] - 102:18 trust [3] - 50:18; 59:25; 92:5 try [11] - 29:4; 52:7; 54:2; 57:10; 64:19; 66:20, 22; 70:18; 106:1; 108:9 trying [18] - 8:8; 10:24; 28:9; 55:22; 58:21; 59:20; 62:10; 64:20; 77:24;</p>	<p>84:5; 94:3; 107:16, 18; 111:1; 121:23; 122:5 tunnel [2] - 59:12 turn [5] - 35:22; 39:7; 75:9; 109:3, 7 turned [1] - 52:8 turns [1] - 25:5 twice [1] - 82:22 two [29] - 8:10; 13:13; 17:9, 22; 23:11; 24:2, 23; 28:17; 31:3, 9; 32:10; 40:18, 24; 43:9; 48:15; 49:1; 51:25; 67:12; 68:22; 69:13; 72:1; 80:23; 84:25; 104:20; 105:4, 17; 110:5; 116:13; 122:5 types [1] - 23:7 typical [1] - 17:9 typically [2] - 79:8; 82:3</p>
<p>T</p> <p>table [1] - 13:7 tables [1] - 12:24 tailored [6] - 48:4; 49:2; 53:25; 75:25; 95:12; 100:21 tailoring [11] - 47:19; 49:11, 19; 60:7; 66:14; 75:11; 76:4; 89:22; 91:5; 99:20, 22 talks [2] - 56:7; 98:16 target [1] - 49:17 task [2] - 52:5; 59:6 taught [1] - 67:1 team [1] - 40:19 teams [1] - 74:20 teasing [1] - 115:8 technical [1] - 60:25 teed [1] - 33:24 telephone [1] - 4:3 ten [3] - 112:5; 116:13; 117:15 tend [3] - 10:21; 116:25; 117:6 tendered [1] - 82:6</p>	<p>U</p> <p>ultimate [3] - 8:3; 14:4; 92:2 ultimately [9] - 12:4; 13:18; 16:5, 11; 25:4; 33:22; 42:6; 64:14; 99:21 unachievable [2] - 28:8 UNC [14] - 15:16; 19:12; 30:12; 39:19, 22; 47:21; 49:13; 50:5; 55:24; 75:24; 97:16; 101:4, 18 UNC's [1] - 15:7 uncertain [2] - 24:10 unchallenged [1] - 95:20 unconstitutional [3] - 16:18; 24:14; 35:16 undefined [1] - 93:11 under [28] - 9:8; 15:4, 8; 19:13; 20:9; 22:7, 9;</p>				

Preliminary Injunction Hearing 12/14/23

44:5; 47:24; 48:3; 51:19; 60:12; 64:25; 66:17; 69:24; 79:12, 19; 80:20; 96:15, 18; 100:17; 101:15; 112:23; 114:17; 115:15 under-inclusive [1] - 48:3 undermined [1] - 38:7 understandable [1] - 102:15 understood [5] - 73:23; 76:14; 84:19; 86:23; 103:23 unethical [1] - 75:5 unfairly [1] - 67:3 unfolds [2] - 86:4 unhealthy [1] - 87:14 unified [1] - 67:22 Union [2] - 5:11 unique [5] - 21:2; 58:13; 74:12; 76:8; 98:10 unit [4] - 67:8; 87:1, 24; 88:9 United [15] - 2:4; 4:9, 12; 6:14; 7:7, 10; 9:16, 24; 10:7, 9-10; 14:16; 30:24; 70:20; 106:10 units [4] - 63:12; 69:20; 92:12 universities [13] - 15:9, 13; 16:19; 36:22; 38:22; 47:6, 23; 49:19; 62:6; 69:7; 99:11, 15, 17 university [2] - 9:25; 72:7 University [8] - 6:19; 8:23; 30:13; 53:1; 105:24 unjustified [1] - 39:24 unlawful [2] - 6:21; 46:24 unless [2] - 68:5; 123:14 unlike [2] - 72:7; 76:25	unlimited [1] - 84:10 unnecessary [1] - 38:2 unpopular [1] - 65:21 unreasonable [1] - 43:20 unreliable [1] - 65:15 unstable [1] - 37:2 unusual [1] - 79:21 up [45] - 29:17; 33:24; 36:13; 38:17; 41:6; 45:23; 51:22; 52:9, 13; 54:8, 20; 59:9, 12, 15; 60:2, 10; 62:13, 23; 64:1, 13; 67:25; 70:15; 73:1; 78:9; 84:6, 12; 86:11; 94:6; 97:8; 103:8; 105:1; 108:9, 20; 111:5; 116:22; 117:12; 118:15, 21, 25; 120:11; 121:23; 123:4, 6, 16 urge [1] - 106:13 urgency [1] - 81:22 urging [1] - 7:23 US [1] - 69:21 useful [1] - 88:3 uses [11] - 24:4; 47:5, 8, 20, 25; 54:5; 78:23; 86:12; 98:6; 99:2; 101:16 utmost [1] - 85:22 utterly [1] - 97:18	Valley [1] - 114:7 variance [1] - 56:20 various [2] - 7:13; 93:12 vast [1] - 36:14 vastly [1] - 36:19 verbatim [1] - 17:24 version [1] - 117:1 versus [14] - 2:4; 6:14, 22; 9:2; 23:4; 30:25; 31:10; 37:25; 45:1; 51:23; 83:21; 85:2; 98:9; 114:2 vet [3] - 14:1; 15:23; 16:10 Vietnam [1] - 57:19 Vietnamese [1] - 54:23 view [22] - 44:21; 50:10; 69:13, 16; 70:4; 71:6, 11; 76:15; 77:8, 23; 84:22, 24; 102:16; 103:12; 105:20; 106:5; 107:15; 110:21; 114:11, 18, 22; 123:2 viewpoint [5] - 37:5; 50:7; 52:22; 91:16, 23 views [3] - 52:24; 66:8; 83:18 violate [1] - 9:4 violated [2] - 8:25; 35:7 violates [3] - 7:15; 49:10; 114:14 violating [2] - 34:15, 17 violation [8] - 36:20; 37:9, 12; 43:2; 45:7, 14; 47:14, 20 violations [1] - 97:13 violence [2] - 87:19; 95:3 Virginia [2] - 40:25; 117:2 vis-à-vis [2] - 58:17; 107:11 Vocational [1] - 41:1	voice [1] - 113:11 volunteer [3] - 56:22; 57:2, 4 W wade [2] - 45:24; 120:10 wait [2] - 74:1; 109:8 waited [2] - 38:11; 56:5 waiting [2] - 39:25; 107:17 walk [1] - 86:13 walks [1] - 57:20 wanes [1] - 84:6 wants [2] - 11:19; 109:14 War [2] - 54:23; 57:19 war [1] - 72:12 war-fighting [1] - 72:12 warned [2] - 113:17; 121:6 warrants [1] - 57:12 water [7] - 27:10; 111:6, 10, 14; 112:22, 25; 113:2 waters [1] - 120:10 wave [1] - 104:20 ways [3] - 21:5; 46:22; 104:12 wearing [1] - 5:21 weeds [1] - 106:1 week [4] - 29:21; 105:1; 115:12; 118:5 weeks [3] - 2:11; 17:9; 116:13 weigh [3] - 40:4; 45:5; 110:10 weighed [1] - 38:3 Weinberger [1] - 83:21 welcome [7] - 2:17; 3:12; 4:4; 5:17, 19; 13:1; 115:6 well-known [1] - 69:21 Wesley [1] - 77:18 West [5] - 7:8; 52:15; 120:18; 121:23; 122:9 whatsoever [1] -	63:8 whichever [1] - 110:12 White [8] - 21:8; 47:11; 51:4; 64:1; 80:19; 81:12; 90:20; 107:8 who've [1] - 67:13 whoever's [1] - 11:20 whole [3] - 15:8; 73:9; 117:12 Whole [4] - 79:7, 12; 81:14; 82:24 holistic [7] - 78:23; 79:15, 18-19; 81:7, 13; 90:17 wholly [1] - 93:20 wife [1] - 121:12 wild [1] - 48:24 willing [3] - 106:13; 119:15; 121:19 willingness [1] - 69:1 win [1] - 66:11 wind [1] - 97:8 winding [1] - 94:6 window [1] - 104:5 Winter [1] - 30:25 witnesses [3] - 120:19; 122:13 women [1] - 84:5 Women [1] - 5:10 word [1] - 39:14 words [1] - 40:22 works [1] - 117:22 world [5] - 74:24; 77:11; 92:8; 96:21; 97:1 worn [3] - 2:7; 5:24; 106:18 worse [2] - 48:13; 54:14 writ [3] - 51:2; 67:16; 73:14 write [1] - 119:2 Wygant [5] - 68:4; 88:24; 89:1, 9 Y YANG [1] - 4:23 Yang [2] - 4:24; 119:20 year [18] - 6:23; 7:21; 8:21;	26:14; 27:16; 28:21; 34:25; 36:5; 39:21; 40:14, 16, 21; 41:9; 43:8; 74:5; 85:13 yearling [1] - 28:20 yearlong [2] - 38:2, 5 years [29] - 19:12, 15, 17, 20, 24-25; 20:2, 6; 28:17; 31:10; 38:10; 39:25; 41:10, 21; 43:9; 44:22; 45:4; 73:7, 20; 74:1; 84:12; 95:10; 100:13; 105:17; 106:17; 116:20; 121:9 yes/no [1] - 48:17 York [3] - 7:7, 18; 40:14 young [5] - 32:10; 84:4; 104:21; 120:10 Z zero [5] - 12:11; 47:7, 9; 97:20; 98:5 zero-sum [2] - 47:7; 97:20 § § [1] - 10:11
--	---	--	---	--	--